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Sopatyk v. Lemhi County Respondent's Brief Dckt. 37186

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIAN P. SOPATYK,
Petitioner-Appellant-Cross-Respondent
v.

Supreme Court Docket No. 37186-2009

LEMHI COUNTY, LEMHI BOARD OF
COUNTY COMMISSIONERS, LEMHI
CLERK-RECORDER, and DOES 1-15, IN
THEIR OFFICIAL AND INDIVIDUAL
CAPACITIES,
Respondents-Cross-Appellants

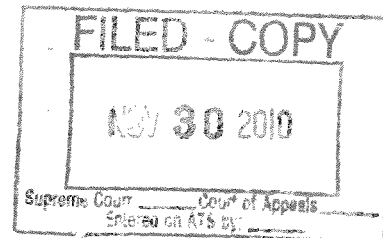
**RESPONSE BRIEF OF RESPONDENTS-
CROSS-APPELLANTS**

Appeal from the District Court of the Seventh Judicial District
Of the State of Idaho, in and for the County of Lemhi,
Honorable Joel E. Tingey, Presiding

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STATEMENT OF THE CASE

This is the Response Brief of Respondents-Cross-Appellants Lemhi County (the “County”), et al. The County agrees with the first two portions of Appellant Brian Sopatyk’s statement of the case (nature of the case and course of the proceedings) in his Opening Brief. The County takes issue with some of the facts, allegations, and conclusions set out in Mr. Sopatyk’s statement of facts. The County offers instead the following brief statement of facts.

Under Idaho law, public roads may be created in any of the following ways:¹ (1) by blanket legislative action (for roads in public use prior to 1881), (2) by formal action of the county or highway district, (3) by prescription (public use and maintenance, or just public use prior to 1893), (4) common law dedication, and (5) by “some positive act” of acceptance by “proper public authorities” if the road is created pursuant to R.S. 2477.² The last way (some positive act) is similar to the second (formal dedication), but is a more lax standard.

The County found that Anderson Creek Road (“ACR”) qualifies as a public road under each of the five road creation tests. It validated approximately 8,500 feet (about a mile and a half) of ACR from Gibbonsville to the Salmon National Forest. The District Court upheld the decision on the basis of blanket legislative action and common law dedication, and found it unnecessary to reach the remaining theories. R., p. 33 (Memorandum Decision at 10).

This case is the natural sequel to *Farrell v. Bd. of County Comm’rs of Lemhi County*, 138 Idaho 378, 64 P.3d 304 (2002), and *Galli v. Idaho County*, 146 Idaho 155, 191 P.3d 233 (2008).

¹ In addition to these, public roads may be created by express conveyance or express dedication through the platting process. This did not occur here.

² The full citation is: An Act Granting the Right-of-way to Ditch and Canal Owners Over the Public Lands and for Other Purposes, *also known as* the Mining Act of 1866, *also known as* Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (1866) (previously codified at Revised Statutes § 2477 (1873) (“R.S. 2477”), re-codified at 43 U.S.C. § 932 (1938)), *repealed by* Federal Land Policy Management Act of 1976 (“FLPMA”) § 706(a), Pub. lines No. 94-579, 90 Stat. 2743, 2793 (1976).

Farrell defined the legal mechanisms for road creation, notably articulating the “lax” standard for R.S. 2477 roads and recognizing common law dedication in the context of public lands. *Galli* addressed the important question of how much evidence is required to establish a public road. *Galli* recognized that in validations of ancient Idaho roads, there is rarely much “direct evidence” of public use, and that, in the proper case, public use may be inferred from circumstantial evidence. In *Galli*, the evidence fell short. Here, there is both direct evidence and overwhelming circumstantial evidence.

In its heyday, ACR was the spine in a transportation network serving a thriving, turn-of-the-century mining community that drew investors from as far away as London, England. In years hence, it provided access for generations of Idahoans to vast public lands used by hunters, fishers, and recreationists. Today, ACR runs through property owned by Mr. Sopatyk, who has blocked all public access.

The record contains substantial evidence from which it may reasonably be inferred that ACR has been in existence and public use at least since the creation of the Gibbonsville townsite in 1878. It originally served as Main Street (running north-south) in this early mining boomtown. From there, it continued north along Anderson Creek, serving as the main “wagon road” and a vital link to a huge network of mines.

Another street, then called Percy Street, ran perpendicular (east-west) through Gibbonsville.

When hydraulic placer mining undermined parts of the original townsite in about 1897, the town moved to the east, and former Percy Street became the new Main Street. Despite the relocation of the town following the washout, ACR continued to serve as the main “wagon road” serving the mining community (running north-south along Anderson Creek).

ADDITIONAL ISSUES PRESENTED ON APPEAL

The first four items in Mr. Sopatyk's statement of issues on appeal are a paraphrasing of the standards of review under Idaho Code § 40-208(7). Although correctly stated, their recitation does little to assist the Court in understanding the issues on appeal. Accordingly, we offer the following summary of issues.

1. Who bears the burden of proof?
2. Was ACR established by blanket legislative declaration in 1881 as shown by (1) the 1878 townsite petition and (2) history of extensive mining before 1881?
3. Was ACR established by formal action when the County approved the 1892 realignment?
4. Was ACR established by five years of public use between 1887 and 1893 or by public use and maintenance after 1893?
5. Was ACR established by common law dedication as shown by the 1897 patent and accompanying plat and survey notes?
6. Was ACR established pursuant to R.S. 2477 and, specifically, does the 1878 petition and the 1872 realignment show that the road meets the "some positive act" test?
7. Is there any evidence of abandonment?
8. Does ACR's alleged encroachment onto federal land make any difference?
9. Was it reasonable to validate ACR 50 feet wide?
10. Were the County's findings as to the local public interest sufficiently articulated?
11. Do Mr. Sopatyk's allegations of bias as to a prior County Commissioner have any bearing on this matter?
12. Should attorney fees be awarded to either party?

ATTORNEY FEES ON APPEAL

The County seeks reversal of the denial of attorney fees by the District Court. It also seeks attorney fees on this appeal. The basis of the County's claims and its objection to Mr. Sopatyk's claim for attorney fees is set out in section IV at page 42.

ARGUMENT

I. ACR WAS CREATED AS A PUBLIC ROAD.

A. ACR was used by the public prior to 1881, and therefore became a public road by operation of legislative declaration in 1881.

There have been three blanket declarations of public roads by Territorial Legislature.³ Only the 1881 statute matters here, and there is ample evidence that ACR existed in 1881.

The 1881 statute provided: "All roads or highways laid out or now traveled, or which have been commonly used by the public . . . are hereby declared county roads" Gen. Laws of the Territory of Idaho, at p. 277, § 1 (1881). There was no requirement of public maintenance and no minimum number of years that the road be in public use. Thus, if the facts show that ACR was commonly used by the public on or before 1881, then the road became a public road by operation of law. The County so found (Ex. 5 (January 24, 2005, *Findings of Fact and Conclusions of Law* ("Findings"))) at 7, Finding Nos. 46 and 47) as did the District Court.

The evidence shows that ACR was in existence in 1878 when miners in the Dahlenega Mining District met to establish the Gibbonsville Townsite. The evidence is found in a petition, signed by the president of a committee of miners, which was submitted to and recorded by the Dahlenega Mining District, Lemhi County, Idaho Territory on August 12, 1878. Ex. 3, C-5 (Minutes, Townsite of Gibbonsville; Ex. 3, C-4 (Plat of Gibbonsville)). The petition recites the

³ Laws of the Territory of Idaho, at p. 578, § 1 (1864) (repealed); Compiled and Revised Laws of the Territory of Idaho, at p. 677, § 1 (1875) (repealed); Gen. Laws of the Territory of Idaho, at p. 277, § 1 (1881) (repealed). An 1885 statute recognized the prior blanket declarations, but did not contain another such blanket declaration. Gen. Laws of the Territory of Idaho, at p. 162, § 1 (1885) (repealed).

events of a miners' meeting on August 3, 1878, in which a new townsite was approved on Anderson Creek. The third paragraph noted expressly: "The road up Anderson Creek to be left open" The eighth paragraph recited: "That the street up Anderson Creek be called Main Street and the other Percy Street." The minutes were accompanied by a "Plat of Gibbonsville" showing ACR (labeled "Main Street 75 ft wide") and Percy Street. Ex. 3, C-4 (Plat of Gibbonsville).

The fact that ACR was to be "left open," is unequivocal, uncontroverted, and direct evidence that ACR was already in existence by 1878.⁴ The only thing remaining is inference of public use, which is fairly obvious given that there was sufficient activity to justify creation of a townsite. In addition, historical references document substantial mining activity in the immediate area prior to the 1878 Townsite Petition:

Prospecting continued in the Gibbonsville area, and by the spring of 1876 word of the continuing strikes of gold set off a stampede from Salmon City, Idaho. . . .

. . . .
The stampede for placer gold brought some experienced hard-rock prospectors into the Gibbonsville area, one of whom was George D. Anderson of Leesburg, Idaho. On August 10, 1877, Anderson located the first lode claims, and one which later turned out to be the richest, along the north slope of Dahlenega Creek on the east outskirts of the Gibbonsville Townsite. These claims later became the main workings of the American Development and Reduction Mining Company (A D & M). On September 5, 1877, Frank and Ira Tingeley located claims that later became the Twin Brothers Mine, just to the southeast of Gibbonsville along the south slope of Dahlenega Creek The third most important mine in the Gibbonsville area was the Clara Morris located along the east slope of Anderson Creek, about 1½ miles north of the Gibbonsville Townsite. This mine produced an estimated

⁴ Mr. Sopatyk states in his Opening Brief at 9-10, "There is no evidence that any actual road was built before or in 1878 or that it was used." Rather than address the evidence upon which the County and the District Court expressly relied, Mr. Sopatyk continues to ignore the evidence and misstate the record on this appeal. Failing to respond to evidence and arguments that have been laid out repeatedly below and stating instead that the County provided only "conclusory statements" that "do not qualify as evidence," Opening Brief at 10, falls short of the duty of candor that Mr. Sopatyk and his counsel owe the Court.

\$250,000. . . .

. . . .
In 1878, the miners in the Gibbonsville area formed the Dahlenega Mining District Most of the placer deposits, and the lode veins had been found by the end of 1877, before the Mining District was formed. . . . Also during 1878, Ira Tingeley and Frank Carey built the first quartz stamp mill for the Twin Brothers Mine, and the first hard-rock mining was underway at Gibbonsville.

In 1881, Messrs. Johnson, Walker & Co. of London, purchased seven of the claims that were originally found by George Anderson, along with a 10-stamp mill for \$250,000.

Ex. 3, C-15-D (*The Golden Years* at 78-80) (emphasis supplied).

Gibbonsville had its beginnings in 1877 when placers were discovered on Anderson Creek. Their presence led to the location of gold-bearing veins in September of that same year. During the fall, one arrasta was build and two were added the next year. By this means \$20 to \$30 a ton was saved. Early in 1881, most of the producing mines were sold to an English company which later went into liquidation and sold the property to Adelbert Ames of New York, who operated them for a number of years.

Ex. 3, C-15-B (*The Ghost Town that Will Not Die*), also found at Ex. 4, P-1.

If that is not enough, the record contains a map (part of a publication by the U.S. Geological Survey dated 1918), Ex. 4, P-8 and Ex. 3, C-20-C (*Geology and Ore Deposits* at 4 and 5), which shows ACR, (labeled “Wagon Road”) running north-south along Anderson Creek through the placers now owned by Mr. Sopatyk. The road provides access to many of the very lode claims mentioned above as being in existence on or about 1877, including the Clara Morris (described in the above-quoted passage as “third most important mine in the Gibbonsville area”). The author does not list the exact date the Clara Morris went in, but it is discussed in the context of two others that went in 1877. Moreover, the author states in the quotation above: “Most of the placer deposits, and the lode veins had been found by the end of 1877” Any doubt that this mine, directly accessed by ACR, was in place by 1881 or earlier is resolved by a discussion

in another source describing the Clara Morris as “one of the older ones in the district.” Ex. 3, C-20-C (*Geology and Ore Deposits* at 133).

It is a reasonable inference that mining at the Clara Morris and elsewhere in the immediate vicinity of ACR must have relied on the main “wagon road” accessing these mines. Contrary to Mr. Sopatyk’s implication, ACR did not just access his property. Unlike the situation in *Galli*, the claim that ACR existed in 1881 is not based on a few scattered “cabins and fences.”⁵ It is based on mining operations of sufficient magnitude to have attracted the attention of investors as far away as New York and London. (See quotations above.) As the District Court correctly concluded, “The Commissioners could reasonably conclude that the owners of those mines and the public used a road along Anderson Creek to access the mines.” R., p. 29 (Memorandum Decision at 6).

This unavoidable inference, coupled with the express statement in the miners’ 1878 petition that the road was in existence at the time (“The road up Anderson Creek to be left open”), is more than sufficient to uphold the County’s conclusion that the road was established by legislative declaration in 1881. The County is entitled to deference in this factual determination. It cannot be said that the County’s conclusion was rendered in the absence of substantial and competent evidence. *Galli*, 146 Idaho at 158, 191 P.3d at 236.

⁵ Mr. Sopatyk misstates the holding in *Galli*. He said, incorrectly, “As held in *Galli*, there must be an ‘express statement’ affirmatively proving the existence and use of ACR for five (years) prior to February 20, 1897.” Opening Brief at 19. In fact, this Court held that the evidence need not be express or direct. Rather, public use may be established by inference based on circumstantial evidence so long as the evidence is strong enough to support the inference. “Although direct evidence is not required, there must be sufficient circumstantial evidence in support of any inferences.” *Galli*, 146 at 161, 191 P.3d at 239. In *Galli*, the Court found that evidence of some “cabins and fences” in 1902 was insufficient to support an inference that the road in question had been there three years earlier. The contrast with the case at bar is overwhelming. The *Galli* case, by the way, arose in a peculiar posture. For no apparent reason, the proponent of the road presented his case solely on the basis of R.S. 2477. Lemhi County, in contrast, considered all five road creation theories.

As noted in footnote 4 at page 10, Mr. Sopatyk fails to grapple with this evidence. Instead, he responds in two ways.

First, Mr. Sopatyk contends, “It was also admitted by the county historian that owners of gold mines did not allow unfettered access into their gold fields by way of public roads.” Opening Brief at 9. Mr. Sopatyk and his counsel have not been forthcoming with the Court. The “facts” relied on by Mr. Sopatyk are no more than his counsel’s unsuccessful effort to elicit testimony that the road was kept private.⁶ In any event, it is hardly plausible that a private road built to access a particular private property with the intent of excluding others would be labeled “wagon road” on a USGS map (Ex. 4, P-8).⁷ It was not unreasonable for the County to conclude that the label “wagon road” was used to describe this road because it was the primary means of access to a vast mining area and was likely used extensively by many miners and other members of the public. This is a reasonable inference, and there are no facts to the contrary.

Second, Mr. Sopatyk contends that a “lack of land division” somehow undermines the legal conclusion of road creation. Opening Brief at 9. First, the land was subdivided. For example, the patenting of placer claims, carved out of the public domain and now owned by Mr. Sopatyk, is a form of subdivision. And, of course, the lots along ACR in Gibbonsville were

⁶ The full colloquy between Mr. Sopatyk’s counsel and the County’s historian is as follows:

MR. SAETRUM: Is it normal, from your study of history, to allow the public unfettered access to a successful mining operation?

MS. BENEDICT: No.

MR. SAETRUM: Would that suggest that the owner would keep the road private so that the public couldn’t wander through there?

MS. BENEDICT: Well, according to the documents that I have, they did not keep it private.”

Ex. 1, p. 87, ll. 14-22 (Tr. Public Hearing Sept. 27, 2004 (“2004 Hearing”)). Having heard from the witness that the evidence shows the road was not kept private, Mr. Sopatyk’s counsel stopped the line of questioning and turned to other matters.

⁷ ACR is also described as a “wagon road” in Ex. 4, P-9 (Recorder Herald newspaper report stating, “The citizens of Gibbonsville have just. completed the survey for a wagon road over the divide into Montana. The route selected is via Anderson Creek and Three Mile.”); Ex. 3, C-10 (Plat of mill site along Anderson Creek shows ACR labeled “wagon road”); Ex. 3, C-1 (ACR is also referenced in the field notes to Mineral Survey No. 1170 at page 68: “Edge of wagon road, course southwest and northwest.”).

subdivided. Mr. Sopatyk's point is not only wrong, it is irrelevant. None of the road creation methods, other than common law dedication, requires subdivision or conveyance of land.

B. ACR was created by formal action of the County.

(1) Approval of the 1892 relocation of ACR as a public road satisfies the "formal action" test.

Over the years various Idaho statutes have authorized local governments to create public roads by official action as they determine appropriate. (See Appendix A.) The operative statute in this case is the one adopted in 1887. It provided:

Roads laid out and recorded as highways, by order of a Board of Commissioners, and all roads used as such for a period of five years, are highways.

Rev. Stat. of Idaho Terr. § 851 (1887) (emphasis shows the "formal action" portion of statute).

In other words, to satisfy this statutory requirement, all that is required is (1) that there be an order by the county commission recognizing that the road is part of the public road system and (2) that the order be recorded.

This 1887 statute was in effect on July 11, 1892, when twelve petitioners filed a petition with the Lemhi County Board of County Commissioners.⁸ Ex. 3, C-8 (1892 Relocation Petition). The petitioners, headed by one Chas. J. Barclay, described themselves as "residents of Road District No. 6." The petitioners employed a printed form designed for validation of new public roads. However, the petitioners modified the form to request that the location of two existing roads be adjusted slightly to avoid cutting across a lot.

⁸ The 1878 miners' petition does not satisfy this statutory requirement for formal action, because the action was not taken by the County Commissioners. See Ex. 5 (Findings at 7-8, Finding No. 50).

The petition includes a hand-drawn diagram showing Main Street and Percy Street—the same streets shown in the 1878 plat.⁹ The longer street (Main Street) is shown on the horizontal axis, while the shorter Percy Street is on a vertical axis. The drawing is not marked to show which direction is north. The County reasonably concluded that it was drawn in this fashion in order to fit Main Street into the longer horizontal space available on the page for the drawing. Ex. 5, (Findings at 5, Finding No. 28).

This 1892 petition was properly recorded in the Lemhi County Road Book, Volume A. Ex. 3, (Hope Benedict’s September 27, 2004 Summary of Evidence (first document of Ex. 3) (“Benedict Summary”) at 5). On the same day, the County Commissioners approved the petition. Ex. 3, C-9 (Commissioners Minutes). The minutes of the approval, likewise, were properly recorded. Ex. 3, (Benedict Summary at 6).

This action was a formal recognition of the public status of the road taken by the County Commissioners. It was properly recorded. Accordingly, ACR was recognized as a public road in accordance with section 851. Mr. Sopatyk denies none of this, but offers four quibbles.

(2) Location versus relocation: A distinction without a difference.

First, Mr. Sopatyk complains that the relocation does not qualify as a formal action under the 1887 statute because, he says, recognizing an existing road as public when it is relocated is not the same as recognizing a road as public when it is first laid out. Opening Brief at 10-11. This is a distinction without a difference.¹⁰ The County can find nothing in this Court’s

⁹ The petition referenced “the plat of the town of Gibbonsville on file in the office of the District Recorder.” This may have been the same Plat of Gibbonsville attached to the miners’ petition of 1878 (Ex. 3, C-4 and C-5). *See* Ex. 5 (Findings at 5, Finding No. 28). Or it may have been another plat. It does not really matter. In any event, the depiction of Main Street and Percy Street matches the plat set out in Ex. 3, C-4, thus confirming that it is a reference to the same Main Street (which is also ACR).

¹⁰ This Court has complained no fewer than 47 times about such pointless “distinctions without a difference.” *E.g., St. Alphonsus Diversified Care, Inc. v. MRI Associates, LLP*, 148 Idaho 479, 495, 224 P.3d 1068, 1084 (2010).

decisions that draws such a fine semantic line. Nor do the words of the statute demand that the recognition of the road as public be contemporaneous with when it is first “laid out.”

The County urges instead a functional reading of this statutory language consistent with the Court’s practical approach to the law of public access reflected in *Farrell*, *Galli*, and so many other cases. The practical purpose of requiring an official declaration in the form of a recorded order by the county commissioners is to ensure that roads crossing private property do not become public based on a mere declaration by county staff, legal opinion, placement on a map, tax assessment, or other less formal act. The statute demands formal action and recording by the County Commission itself. But that is all it requires. Any recorded order recognizing the existence of a road as public should satisfy the statutory requirement for formal road creation. It should make no difference whether this occurs when the road is first constructed by the county, when the road is constructed by others and accepted later by the county (as in *Farrell*), or upon subsequent relocation and approval by the county (as here). The formal, recorded action by the Lemhi Board of County Commissioners approving the alteration of the course of ACR satisfies this legislative requirement.

(3) The north-south versus east-west non-issue.

Next, Mr. Sopatyk tries to make something of the County Clerk’s mistaken reference in 1892 to the direction in which ACR runs. A one-paragraph summary of the County’s action approving the relocation petition prepared by the County Clerk (Ex. 3, C-9) incorrectly describes the orientation of the roads in the petition (Ex. 3, C-8). In his brief, Mr. Sopatyk says, “The petition refers to a Main Street running east-west and a Percy Street running north-south”

Opening Brief at 11. This misstates the record.¹¹ The 1892 petition (Ex. 3, C-8) says nothing about direction. As noted in the County's Findings: "The drawing is not marked to show which direction is north. As depicted, the longer street (Main Street) is shown on the horizontal axis, while the shorter Percy Street is on a vertical axis. It appears to have been drawn in this fashion in order to fit Main Street into the longer horizontal space available on the page for the drawing." Ex. 5 (Findings at 5, Finding No. 28). This conclusion is supported by testimony of the County's historian, Dr. Benedict. Ex. 1, p. 93, l. 24 to p. 94, l. 16 (Tr. 2004 Hearing).

In other words, north would have been to the left on the petition. Apparently the clerk (who may have lived far away in Salmon) assumed that north was to the top of the page, as it usually is. Accordingly, she described the subject parcel as being bounded on the north by Main Street (ACR). Ex. 3, C-9.

This minor error in orientation is of no legal consequence. ACR is where it always has been. That 1878 plat (Ex. 3, C-4) shows Main Street (ACR) running north-south along Anderson Creek and Percy Street running perpendicular. They are depicted just the same on the 1892 petition (Ex. 3, C-8). The only plausible conclusion is that the 1892 petition describing Main Street and Percy Street in Gibbonsville refers to the same streets with the same names as in the 1878 plat (Ex. 3, C-4).

Despite this, Mr. Spopatyk complains: "There is no evidence that in July 1892 the term "Main Street" did not refer to the main road running east-west through Gibbonsville." Opening Brief at 11-12; Supp. C.R., Sopatyk's Opening Brief Below at 14-15. This makes no sense. It

¹¹ This is another instance in which Mr. Sopatyk has persisted in misstating the record, despite the fact that the error was pointed out during the judicial review below. Supp. C.R., Sopatyk's Opening Brief Below at 14, County's Response Brief Below at 18-19.

was not until several years later that the town was moved to the east and east-west Percy Street became the new Main Street.

This timing is well documented. The record reports in several places that in 1897 and 1898, placer mining undermined part of the original Gibbonsville Townsite. Indeed, this washout is what precipitated the emergency trip to Washington, D.C. to get President Roosevelt's approval of the Townsite. *E.g.*, Ex. 3, C-15-D (*The Golden Years* at 81); Ex. 3, C-15-A (*Mines and Minerals*). The patent signed by Theodore Roosevelt creating the townsite of Gibbonsville on October 30, 1901 is set out in Ex. 3, C-19. The President's action, however, came too late. Enough damage had been done by the placer mining to necessitate the relocation of the town just to the east along Dahlenega Creek. Ex. 3, C-15-C (*Over the Back Fence*). As a result, Percy Street was renamed as the new Main Street. Ex. 3, C-15-B (*The Ghost Town that Will Not Die*), also found at Ex. 4, P-1. But this did not occur until sometime on or after 1898. *Also see*, Ex. 3, C-15-C (*Over the Back Fence*). So the reference to Main Street in 1892 must have described the original Main Street, also known as ACR.

(4) Recording of the plat—another non-issue.

Mr. Sopatyk persists in another pointless quibble he presented first to the District Court. It is difficult to understand exactly what his point is, but he appears to think it is of some consequence that the 1892 petition refers to “the plat of the town of Gibbonsville on file in the office of the District Recorder.” Opening Brief at 11; Supp. C.R., Sopatyk's Opening Brief Below at 14. Most likely, the 1892 petition was referring to the 1878 plat discussed above (Ex. 3, C-4). Conceivably some other plat had been created, though none is in the record. But this makes no difference. The 1887 statute does not require recording of a plat; it only requires recording of the formal decision recognizing the road as public. The decision documents (Ex. 3, C-8 and C-9) are produced from the official records of the County. Mr. Sopatyk does not dispute

that they were recorded. Mr. Sopatyk's statement that the statute is not satisfied "because we do not know what plat was recorded with the District Recorder" (Opening Brief at 12; Supp. C.R., Sopatyk's Opening Brief Below at 15) simply makes no sense.

(5) Maintenance is not required for an official declaration.

Finally, Mr. Sopatyk claims that the formal action of the County in 1892 was inadequate because "there is no evidence of use for five (5) years." Opening Brief at 12; Supp. C.R., Sopatyk's Opening Brief Below at 15. Mr. Sopatyk continues to confuse formal declaration with prescriptive use, discussed below. Though they derive from the same statute, these are alternative methods of road creation.

C. ACR was established by prescriptive use.

(1) Public use alone was sufficient to create a public road prior to 1893.

The same 1887 statute discussed above provides an alternative method of road creation.¹² This is reflected in the underlined portion of the statute:

Roads laid out and recorded as highways, by order of a Board of Commissioners, and all roads used as such for a period of five years, are highways.

Rev. Stat. of Idaho Terr. § 851 (1887) (emphasis shows "prescriptive use" portion of statute).¹³

Until the statute was amended in 1893 to add a maintenance requirement, the only requirement was a showing of five years of public use. As discussed above in section I.A at page

¹² In the judicial review before the District Court, Lemhi County withdrew its Finding No. 56 (Ex. 5 (Findings at 8)), which also premised prescriptive use on the 1864 and 1885 statutes. Supp. C.R., County's Response Brief Below at 21 n.23. The County also acknowledges that the reference in Finding No. 52 (Ex. 5 (Findings at 8)) to a two-year use requirement is inaccurate. The inaccuracy in these findings is of no consequence whatsoever to the ultimate decision reached by the County with respect to prescriptive use, which is based solely on the 1887, 1893, and modern versions of the statute.

¹³ This 1887 statute is the operative statute upon which the County relies. Ex. 5 (Findings at 8, Finding No. 54); Supp. C.R., County's Response Brief Below at 21. It is unclear why Mr. Sopatyk discusses an 1885 statute in his Opening Brief at 12. In any event, his explanation of the 1885 statute is wrong. (See summary of the statute in Appendix A.)

9 (blanket declaration), ACR was used by the public at least since 1878 (the year of the miners' petition for a townsite saying that the road should be "left open") and served mines in existence as early as 1877. Other evidence in the record shows other mines served by the road in operation on or before 1888.¹⁴ The 1896 field notes for the placer claims also document settlement along the road:

The accompanying survey records . . . note the existence of a 60 foot wide road running north Not only does it mention the road it mentions multiple cabins, saloons, etc. along the course of the claim—especially of course near the south end."

Ex. 3, (Benedict Summary at 1) (emphasis omitted).

The record shows that the town of Gibbonsville continued to thrive for many years thereafter.

The town of Gibbonsville was named for Col. John Gibbons who defeated Chief Joseph's Nez Perce warriors at the battle of the Big Hole in 1877, the year gold was discovered. The Townsite was created by an act of Congress, and in July, 1899, was patented by Judge Steel. At that time, 1899, there were 29 business houses with improvements worth \$36,000 and the population was 450. During the boom years, it had reached about 3,000.

Ex. 3, C-15-B (*The Ghost Town that Will Not Die*), also found at Ex. 4, P-1. ACR continued to be used even after the Gibbonsville Townsite was moved to the east, along Dahlenoga Creek.¹⁵

¹⁴ The fifth page of Ex. 4, P-4 contains a recorded statement by Frank W. Hunt dated April 27, 1888 describing the Mountain Top and other mines in existence as of that date. The Mountain Top is shown in the map at Ex. 4, P-8 and is plainly accessible only by ACR.

The U.S.G.S. publication, *Geology and Ore Deposits* at 133 (Ex. 3, C-20-C), describes the Clara Morris group as having produced \$250,000 "at intervals from 1888 and 1908." The Clara Morris claim also appears in the map at Ex. 4, P-8 and is also plainly accessed by ACR. As discussed above in section I.A at page 9, the Clara Morris appears to have been located as early as 1877.

¹⁵ "This deeding of town site by the president is simply the culmination of the problems created by placer mining along Anderson Creek Road—the original Main Street: the washouts, the creation of the Placer Hole from mining and washouts, and the breaking of the trestle. The original plan for the town development had been undermined (no pun intended) by the mining efforts of those with placer claims along Anderson Creek. This does not mean that the Anderson Creek Road was no longer used: it was used to access mining claims, there were cabins along the road (see affidavit information), the road is designated on subsequent maps, and was used for logging

This is hardly surprising. While the town moved, the mines and mills served by ACR did not move. All evidence, and the fact that the road is still there today (although much impaired by the closure caused by Mr. Sopatyk), demonstrates that ACR was used by the public long after it was Gibbonsville's Main Street.

(2) After 1893, both public use and maintenance can be shown.

In 1893 the road creation statute was amended to add a requirement of public maintenance. 1893 Idaho Sess. Laws at p. 12, § 1 (then codified at Rev. Stat. of Idaho Terr. § 851; codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).

Of course, there is no need to demonstrate road creation after 1893, since it already has been demonstrated before 1893. Nevertheless, road creation can be established even after public maintenance became a requirement.

Evidence of public maintenance is found in the fact that ACR was included in Road District No. 6, which received regular road maintenance funding. Ex. 3, C-18-A, C-18-B, C-18-C, C-18-D, C-18-E; Ex. 5 (Findings at 7-8, Findings Nos. 42 and 57). These records, by and large, do not reflect exactly which road was worked. However, the fact that ACR (then a significant "wagon road" accessing numerous mines) was included within the district is a sufficient basis to infer that road work was done on ACR to the extent required.¹⁶ Public

purposes in the 1940s (see Marcus Jordan information), and according to affidavit statements continues to be an important aspect of Gibbonsville." Ex. 3, (Benedict Summary at 11). See also testimony of Dr. Benedict (Exhibit 1, p. 44, ll. 15-25, p. 48, ll. 11-20 (Tr. 2004 Hearing)) and her reference to an 1899 plat of a portion of the Gibbonsville Mining District (Ex. 3, C-12), which continues to depict ACR after washout of approximately 1897.

¹⁶ In any event, it is not necessary to show that maintenance occurred every year or throughout the entire course of the road. "Such maintenance need only consist of work and repairs that are reasonably necessary" *Roberts v. Swim*, 117 Idaho 9, 16, 784, P.2d 339, 346 (1990). "It is not necessary for the county to do work upon a road that does not need work to keep it in repair or to put it in condition for the public to travel." *State v. Berg*, 28 Idaho 724, 724, 155 P.968, 969 (1916) (finding road creation through five years of public use despite no evidence of public maintenance). "Maintenance need only be work and repairs that are reasonably necessary; it is not necessary maintenance be performed in each of the five consecutive years or through the entire length of the road." *Ada County Highway Dist. v. Total Success Investments, LLC*, 145 Idaho 360, 366, 179 P.3d 323, 329 (2008). "Very few

maintenance also may be inferred from the fact that the road survived for so many decades.

This conclusion regarding maintenance is supported by testimony of the County's historian, Dr. Benedict. Ex.1, p. 91, l. 20 to p. 93, l. 7 (Tr. 2004 Hearing).¹⁷ The record also contains ample evidence of continued public use.¹⁸

D. ACR became a public road by common law dedication when the mineral patent issued.

(1) Common law dedication occurs when a patent issues referencing a plat or other description showing the road.

In the course of real estate development, roads may be dedicated to the public in accordance with statutory procedures (*e.g.* Idaho Code §§ 50-1301 to 50-1334 governing dedications by real estate developers creating subdivisions). In addition, however, this Court has long recognized an alternative means of dedication known as common law dedication. *Boise City v. Hon*, 14 Idaho 272, 94 P. 167 (1908). The doctrine of common law dedication allows the Court to recognize that a dedication has occurred even when statutory procedures are not followed.¹⁹

roads require work throughout their entire length. Our statute does not require work to be done upon a part of a highway not needing work.” *Gross v. McNutt*, 4 Idaho 286, 289, 38 P. 935, 936 (1894).

¹⁷ Mr. Sopatyk mischaracterizes this testimony in his Opening Brief at 13. He states: “In fact, the expert retained on behalf of the County, Hope Benedict, testified that her research into the matter revealed that the County did not expend any money to maintain ACR.” Dr. Benedict said no such thing. Instead, she explained, consistent with the County’s Findings, that the evidence does not state which roads within Road District No. 6 funds were spend on, and that this is not uncommon.

¹⁸ Dr. Benedict’s summary of evidence (Ex. 3 (Benedict Summary)), Dr. Benedict’s summary of public comments from the 2004 validation hearing (Ex. 5 (Exhibit C to Findings)), and the extensive public testimony discussed in footnote 44 at page 40.

¹⁹ For instance, in *Pullin v. Victor*, 103 Idaho 879, 655 P.2d 86 (Idaho Ct. App. 1982), a developer filed a plat in 1909 dedicating a road, which remained unbuilt until the 1960s. Homeowners challenged the 1909 dedication on the basis that it had never been accepted by the city, as required by the platting statute. The Court of Appeals ruled that common law dedication does not require such compliance.

At its core, a common law dedication simply requires an “offer” of dedication by the original owner (often but not necessarily in the form of a plat filing) and “acceptance” reflected in sales of property pursuant thereto.²⁰ This Court has offered this summary of the doctrine:

When an owner of land plats the land, files the plat for record, and sells lots by reference to the recorded plat, a dedication of public areas indicated by the plat is accomplished.

Smylie v. Persall, 93 Idaho 188, 191, 457 P.2d 427, 430 (1969); *Boise City v. Hon*, 14 Idaho 272, 94 P. 167 (1908).

Most often, common law dedication occurs in the context of commercial or residential subdivision development, enabling recognition of public roads, open space, and other dedications despite noncompliance with statutory requirements. But this Court established in *Farrell* that the doctrine applies equally to conveyances of public land to private persons by federal patent. *Farrell*, 138 Idaho at 385, 64 P.3d at 311. Thus, when the federal government issues a homestead patent pursuant to a plat or written description of a road, that road is deemed to have been dedicated to the public by the federal government.

A common law dedication occurred when the federal government issued Mineral Patent No. 28383 for Lot No. 1187 to William Davis et al. in 1897. (Ex. 4, S-5). The patent was issued in reference to a plat and field notes for Mineral Survey No. 1187 (Ex. 3, C-1, also included within Ex. 3, C-2). The plat depicts ACR running adjacent to Anderson Creek. Likewise, the field notes reference the road at page 599 (feet 148): “Anderson Creek, 3 feet wide, courses S.E. southwesterly. Road, 60 ft. wide, courses North.” The road is also referenced in the field notes to the adjacent Mineral Survey No. 1170 (Ex. 3, C-1) at page 69 (feet 210, 270, and 351.4):

²⁰ This sounds a bit like the offer and acceptance provided for under R.S. 2477, discussed in section I.E(1) at page 25. Indeed, common law dedication may well be a proper means of “accepting” the federal grant.

“Edge of road, course northerly. Edge of road, course southerly” [appears to be changed to “northerly.”] and at page 68 (feet 187): “Edge of wagon road, course southwest and northwest.”

Mr. Sopatyk disputes none of this. Instead, he rests his argument that no common law dedication occurred on two points, discussed below.²¹

(2) Homestead patents versus mineral patents: A meaningless distinction.

First, he says that *Farrell* only extended common law dedication to homestead patents, not mineral patents. This is true, but the same logic *Farrell* applied to homestead patents applies to mineral patents, both of which convey the entire fee. As the Court said in *Farrell*, “The federal government was the owner of the land, and it filed and recorded a valid plat. That is sufficient under *Worley* to show intent on the part of the owner to dedicate public areas of the plat.” *Farrell*, 138 Idaho at 385, 64 P.3d at 311 (referring to *Worley Highway Dist. V. Yacht Club of Coeur d’Alene, Ltd.*, 116 Idaho 219, 224, 775 P.2d 111, 116 (1989)). Nothing in the language of *Farrell* suggests the case should be limited to its facts (homestead patents) as urged by Mr. Sopatyk.²² The intent of the federal government was clear. The homesteading, mining, and R.S. 2477 laws were aimed at settling the west and creating a network of public roads. This fits the common law dedication doctrine to a T.

In sum, both homestead and mineral patents involve conveyances by deed based on an implied representation by the original owner that a road will be made available. Thus, when the

²¹ Mr. Sopatyk made these same points in his argument to the District Court, and the County responded. Following a pattern, Mr. Sopatyk makes them again here, without so much as acknowledging (much less responding to) the County’s discussion of why he is wrong.

²² In *Farrell*, the Court re-stated the requirements, speaking broadly in terms of offer and acceptance. “The elements of a common law dedication as established by *Pullin v. Victor* are ‘(1) an offer by the owner, clearly and unequivocally indicating by his words or acts evidencing his intention to dedicate the land to public use, and (2) an acceptance of the offer by the public.’” *Farrell*, 138 Idaho at 384, 64 P.3d at 310 (quoting *Pullin v. Victor*, 103 Idaho 879, 881, 655 P.2d 86, 88 (Idaho Ct. App. 1982)).

federal government issues a patent deed pursuant to a map depicting a road, that road is deemed to have been dedicated to the public by the federal government.²³

(3) Lots sold: A misunderstanding of the rule.

Next, Mr. Sopatyk complains, Opening Brief at 19, that there is no showing that lots have been sold with reference to the plat. First, this is not true.²⁴ More importantly, however, Mr. Sopatyk's statement reflects a basic misunderstanding of the holding in *Farrell*. The requirement that lots be sold is met by the issuance of the patent itself.

In this scenario, the United States plays the role of the real estate developer. The patentee "accepts" the federal government's "offer" in the form of a patent based on a land survey. To acquire the patent, the patentee must pay a fee to the owner (the United States). This is the functional equivalent of a purchaser buying a lot in a subdivision. Indeed, the subject patent conveyed "Lot No. 1187." Ex. 3, S-5. As the *Farrell* Court explained: "That the road was clearly marked and labeled on the plat and patent is sufficient to create an offer to dedicate a public road. . . . Furthermore, the grant of homestead patents constitutes a valid acceptance of a common law dedication." *Farrell*, 138 Idaho at 385, 64 P.3d at 311.

E. ACR is an R.S. 2477 road.

(1) ACR was created through compliance with state road creation law.

One of the more interesting areas of road law deals with the creation of rights-of-way under a federal statute, section 8 of the Mining Act of 1866, commonly referred to as R.S. 2477.

²³ Common law dedications often occur without words of dedication. In other words, the plat does not need to state, "I hereby dedicate this road." As noted above, a dedication may be predicated on "words or acts." *Farrell*, 138 Idaho at 384, 64 P.3d at 310. Typically, the "act" is the depicting of the road on a plat. "[T]he act of filing and recording a plat or map is sufficient to establish the intent on the part of the owner to make a donation to the public." *Farrell*, 138 Idaho at 384, 64 P.3d at 310; Ex. 5 (Findings at 9, Finding No. 59).

In this post-Civil War era legislation, the United States government encouraged the creation of a road network over its vast western estate, forever granting to local authorities ownership of these rights-of-way. As a result, western states now exercise considerable control over roads located on federal lands and former federal lands.

It all began with a single sentence, described by the Tenth Circuit as “short, sweet, and enigmatic.” *S. Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 761 (10th Cir. 2005):

And be it further enacted, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

R.S. 2477, § 8. The effect of this statute was to create a free-standing offer to the public to construct roads across the public domain, and to convey title to such rights-of-way to the local entity in accordance with local law.²⁵

By its own terms, R.S. 2477 applies only to roads “over public lands, not reserved for public uses.” Thus, the threshold question in every R.S. 2477 claim is, was the land over which the road lies unreserved public land at the time the road was created? There is no dispute that the land containing the ACR left the public domain in 1897.²⁶ The evidence discussed above shows that ACR was in existence well before 1897.²⁷

²⁴ Again, Mr. Sopatyk misstates the record. For example, Ex. 3, C-6-A is a recording of a town lot sold in Gibbonsville “joining the Millsite of Strickland & Davis on the East-line fronting the County-road running North 100 feet” There was only one county road at the time, and certainly only one running north. It was ACR.

²⁵ One might ask, if R.S. 2477 simply looks to state law to determine whether a road has been created, what did the federal statute accomplish? The answer is simple: it allowed state roads to be created on federal property. See discussion in section III.C at page 34.

²⁶ The County found as follows: “The land upon which Anderson Creek Road lies remained in the public domain until February 20, 1897, the date on which a receiver’s certificate was issued to William Davis, et al. demonstrating that the application for patent and all accompanying fees and documents were properly filed in connection with Mineral Entry No. 450.” Ex. 5 (Findings at 11, Finding No. 72(A)). Mr. Sopatyk concurs. Opening Brief at 17.

²⁷ Mr. Sopatyk appears to be confused on this point. He refers to the law in existence as of the year the land left the public domain. “The Commissioners have the burden to show compliance with the road creation statutes in existence in 1897.” Opening Brief at 17. Of course, the County has shown that. But it has also shown

Although R.S. 2477 is a federal statute, the law is well settled that state law governs how the federal offer is accepted. *Galli*, 146 Idaho at 155, 160, 191 P.3d at 233, 238 (“State law governs whether a highway has been created under R.S. 2477.”).

That state law rule is easily stated: “Under R.S. 2477 a public road may be created under the state road creation statute or where there is a positive act of acceptance by the local government.” *Farrell*, 138 Idaho at 384, 64 P.3d at 310 (quoting *Kirk*, 63 Idaho at 282-83, 119 P.2d at 268 (citations omitted)).

The discussion above also shows that ACR has complied with four forms of Idaho road creation law (blanket legislation, formal approval, prescriptive use, and common law dedication).²⁸ Any one of these is sufficient. Each occurred prior to 1897, when the land left the public domain.

(2) In the alternative, ACR met the more “lax” test for R.S. 2477.

(a) The 1878 townsite petition.

If strict compliance with state road law were not enough, ACR also meets the more relaxed standard of “some positive act or acts on the part of the proper public authorities.” *Kirk v. Schultz*, 63 Idaho 278, 282-83, 119 P.2d 266, 268 (1941). As this Court said, “[T]he second method requiring any ‘positive act’ is more lax than the requirements set forth in the state road creation statute.” *Farrell*, 138 Idaho at 384, 64 P.3d at 310.

compliance with the state law in existence in 1881 (blanket legislation) and 1887 (prescription and formal action), any of which is sufficient to create an R.S. 2477 road. In other words, the road may be created under state law in effect at any time prior to the land leaving the public domain.

²⁸ Since acceptance of a road under R.S. 2477 is governed by state law, it would seem that either state statutory or common law (common law dedication) would suffice. It is not clear why this Court in *Farrell* and *Galli* referred only to statutory law or “some positive act.” The County suggests the more logical rule is statutory or common law or some positive act. In any event, there are plenty of legal theories to justify recognition of ACR.

The County relied on the 1878 townsite petition (which said that ACR should be “left open”) to establish the factual premise that the road was in existence and used by the public for purposes of road creation under (1) the 1881 blanket legislation, (2) prescriptive use, and (3) common law dedication. The County did not claim that the 1878 townsite petition constituted formal action by the County (see footnote 8 at page 13). However, the County found that the petition constituted “some positive act” by “proper public authorities” sufficient to satisfy the more lax test under R.S. 2477.

Mr. Sopatyk objects to the 1878 petition for two reasons. First he says: “The miners’ committee, however, is not a ‘local government’ which can take a positive act to accept the grant.” Opening Brief at 21. This overlooks the whole point of the more “lax” standard of compliance reflected in the “some positive act” test. The miners’ committee may have been informal (as one would expect during territorial times), but it was sufficiently authoritative to secure the approval of none other than President Roosevelt himself when the townsite was approved in 1899. Ex. 3, C-15-D (*The Golden Years* at 81). Surely that meets the test of “some positive act or acts on the part of the proper public authorities” set out in *Farrell*, 138 Idaho at 384, 64 P.3d at 310.²⁹ After all, this was 1878. This is how things were done on Idaho’s frontier.

Mr. Sopatyk’s second argument is about where the plat was recorded: “[T]he 1878 plat of Gibbonsville found at Exhibit C-4 was never recorded with the County, but ‘filed and recorded in the Dahlonaga Mining District Official Ledger.’” Opening Brief at 21. This is even more pointless. The “positive act” test does not require any recording, so there is not much point

²⁹ In the course of this discussion, Mr. Sopatyk contends: “In fact, it was testified at the September 27, 2004, hearing that ACR was not included in the township survey submitted and approved in 1901. 2004 Transcript, p. 98, ll. 7-19.” Opening Brief at 18. Be that as it may, there is ample evidence of ACR on other maps, documents,

in debating where it was recorded. In any event, avoiding arguments over such things as the technicalities of recording was the whole point of the *Kirk* and *Farrell* decisions.³⁰

(b) The 1892 relocation petition.

In any event, even if the Court deems the 1878 miners' petition insufficient to meet the "some positive act" test, there is always the 1892 road relocation petition and approval by Lemhi County. Ex. 5 (Findings at 8 and 11, Finding Nos. 51 and 72(E)). There is no credible argument that this action did not constitute "some positive act" recognizing the existence of ACR as a public road. Mr. Sopatyk does not even address this point.

II. THERE IS NO EVIDENCE OF ABANDONMENT.

A. Passive road abandonment requires affirmative proof of both non-use and non-maintenance.

In order to uphold the County's decision validating ACR, this Court must conclude not only that ACR was lawfully created as a public road, but that it has not been abandoned. There are two types of road abandonment in Idaho: formal abandonment (by official act) and passive abandonment based on both non-use and non-maintenance over time. There is no evidence and no claim of formal abandonment. Mr. Sopatyk contends, however, that passive abandonment has occurred. He is wrong.

Idaho's first abandonment statute was adopted in 1887. It provided in full: "A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."

and testimony. In any event, what happened in 1901 has nothing to do with the question of whether the 1878 townsite petition constituted "some positive act."

³⁰ In *Farrell*, the plaintiff contended that Lemhi County's decision to accept the road was not properly recorded. The Court brushed aside the statutory requirement for recording. The Court's more "lax" standard allowed the Court to find that the County's acceptance of a miners' petition for the road "pasted in the old leather-bound County book" constituted "a clear manifestation of an intent to accept a road"—irrespective of whether it was properly recorded. *Farrell*, 138 Idaho at 384, 64 P.3d at 310.

Rev. Stat. of Idaho Terr. § 852 (1887) (later codified at Idaho Code § 40-203(4)) (repealed by S.B. 1108, 1993 Idaho Sess. Laws ch. 412, § 1).³¹

The phrase “not worked or used” might sound like either would be sufficient to work an abandonment. However, this Court has made clear that one asserting abandonment must “prove the negative” with regard to both the “use” and “maintenance” elements. *Taggart v. Highway Bd.*, 115 Idaho 816, 817, 771 P.2d 37, 38 (1989). As the Court said again in 2002, “Therefore, there is a dual requirement of both non-maintenance and non-use for a five-year period for abandonment.” *Farrell v. Bd. of County Comm’rs of Lemhi County*, 138 Idaho 378, 385, 64 P.3d 304, 311 (2002).

B. Passive abandonment does not apply to ACR.

ACR is immune from passive abandonment for two reasons.

First, there is an argument that the passive abandonment statute only applies to roads created by prescription.³² If this is correct, ACR is not subject to passive abandonment because it was created by county dedication and legislative dedication (as well as by prescription).

Second, it is well settled that roads created by common law dedication are not subject to passive abandonment. *Farrell*, 138 Idaho at 386, 64 P.3d at 312. As shown above, ACR was created by common law dedication by way of the mineral patent of 1897 (see section I.D at page

³¹ The law was substantially limited in 1963 (e.g., making it inapplicable to roads like ACR accessing public lands) and repealed in 1993. Those changes are not relevant here. because Mr. Sopatyk is asserting abandonment prior to 1963.

³² The Legislature amended the passive abandonment statute in 1963 to expressly provide that it is applicable only to roads created by “prescription” (referring to the public use road creation provision). There is an argument that the 1963 amendment merely codified existing law. After all, it makes some intuitive sense that the Legislature would have intended that abandonment by non-use apply only to roads created by use. This conclusion is supported by the outcome in *Taggart v. Highway Bd. for N. Latah County*, 115 Idaho 816, 817, 771 P.2d 37, 38 (1989). In *Taggart*, the Court declined to apply the passive abandonment statute to a road because the road had been created by formal action, not by “prescription.” This occurred despite the fact that the alleged period of non-use and non-maintenance was prior to 1963. Unfortunately, the Court failed to explain its reasoning, or even to discuss the 1963 amendment. Consequently, it is difficult to tell if this was the intended ruling, or a mistake based on unfamiliarity with the history of the statute.

22). Thus, the only way to abandon a road created by common law dedication is by formal declaration of abandonment by the county, and there has been none.

C. Mr. Sopatyk carries the burden of proof on abandonment.

In any event, Mr. Sopatyk has the burden of proving abandonment:

Upon establishment of a public road by prescription, the burden shifts to the opponents of the public road to show a subsequent abandonment or extinguishment of those rights.

Floyd v. Bd. of Comm'rs of Bonneville County, 137 Idaho 718, 728, 52 P.3d 863, 873 (2002)

(“*Floyd II*”). The Court reinforced the point in the *Farrell* case decided the same year:

However, once a right of way or public road is proven the burden of showing abandonment of that road by non-use and non-maintenance is on the party asserting abandonment.

Farrell, 138 Idaho at 386, 64 P.3d at 312.

Accordingly, it is not sufficient for Mr. Sopatyk to state that there is no evidence of use or maintenance. He has the affirmative duty to point to evidence proving non-use and non-maintenance. Moreover, the quantum of use required to avoid abandonment is very low. As the Court said in *Farrell*:

As to the level of use required to prevent a finding of abandonment, a showing of “any continuous use no matter how slight, by the public, is sufficient.”

Farrell, 138 Idaho at 385, 64 P.3d at 311.

D. Mr. Sopatyk offers no evidence of abandonment.

The County hired an historian to search out evidence of abandonment. She found none. “I found no evidence of road abandonment in my historical research.” Ex. 3, (Benedict Summary at 1).³³

³³ ACR may or may not have been moved slightly to avoid the washout caused by placer mining in 1897 or 1898, but any such movement is legally inconsequential. The record does not reflect any re-alignment of ACR. But

Mr. Sopatyk offered none, either. Instead of evidence, Mr. Sopatyk offers this statement to prove non-use: “As discussed throughout this Brief, there is no supported evidence of use on ACR.” Opening Brief at 14; Supp. C.R., Sopatyk’s Opening Brief Below at 17. Suffice it to say, that is not evidence, and this bald assertion does not come close to meeting his burden of affirmatively demonstrating complete non-use of the road for five years. Despite having had this explained to him below (see footnote 33 at page 34 and Supp. C.R., County’s Response Brief Below at 32-34), Mr. Sopatyk still does not grasp that he carries the burden of proof on abandonment. Indeed, he avoids the subject altogether.

As for maintenance, Mr. Sopatyk offers this: “Additionally, the evidence shows that no maintenance was performed on ACR from 1869 through the 1920s. No maintenance records can be produced by the Commissioners showing maintenance on ACR from 1920 through 1960.” Opening Brief at 14; Supp. C.R., Sopatyk’s Opening Brief Below at 17. In support of this assertion, he offers an affidavit of himself saying that he reviewed the road maintenance records and that “[t]here was no mention of maintenance or payment for maintenance or use of any kind regarding a ‘Anderson Creek Road.’” Ex. 4, S-1 (Sopatyk Affidavit at p. 1, ¶ 7). Again, this falls short of Mr. Sopatyk’s burden of affirmatively proving that no maintenance occurred. In

even if it were necessary to move the road as a result of the hydraulic mining, this does not change its status as a public road. In *Farrell*, opponents of a public road sought to prove non-use based on the fact that the road had been largely re-aligned along a creek bed, with substantial stretches jumping from one side of the creek to the other. The Supreme Court squarely rejected this theory: “After 1955, the Ranch Owners allege that the road was not used because it was relocated by the Forest Service. . . . The Ranch Owners based the majority of their non-use abandonment claim on the non-use of the portions of the road abandoned because of realignment. Abandonment of the old portions of a realigned road, however, is not evidence of non-use or abandonment of the realigned new road unless the changes actually change the identity of the road originally laid out.” *Farrell*, 138 Idaho at 386, 64 P.3d at 312. This ruling reflects the practical reality in Idaho that mountain roads are routinely re-aligned in response to washouts and other events. This is consistent with a 1932 decision by the U.S. Supreme Court. *Central Pac. Ry. Co. v. Alameda County*, 284 U.S. 463, 467 (1932). The federal district court in Idaho recently cited this case as controlling authority on this point. *United States of America v. Boundary County*, Case No. CV98-253-N-EJL, at 5 (D. Idaho, Memorandum Decision and Order, Aug. 28, 2000); accord, *Sheridan County v. Spiro*, 697 P.2d 290, 296 (Wyo. 1985); *Schultz v. Dept. of the Army, U.S.*, 10 F.3d 649, 655 (9th Cir. 1993).

This is apparently a non-issue. Mr. Sopatyk has not raised it. The County includes this footnote out of an abundance of caution, and with apologies to the Court, to ensure that it remains a non-issue.

the face of strong circumstantial evidence that public maintenance occurred (discussed above in section I.C(2) at page 21), Mr. Sopatyk must do more than say he looked in some books and did not find specific proof of public maintenance. As the District Court noted, proving non-maintenance is not easy.³⁴ But that is Mr. Sopatyk's burden, and he has not met it.

III. MR. SOPATYK'S MISCELLANEOUS ARGUMENTS HAVE NO MERIT.

Mr. Sopatyk concludes his brief with a litany of throw-away arguments, all of which were raised and rejected below. Mr. Sopatyk simply recites them again on this second appeal, without any effort to respond to the arguments presented below. The County addresses each in turn.

A. The County's decision does not constitute a taking or due process violation.

Mr. Sopatyk's argument (Opening Brief at 20-21) that the validation of ACR violates his due process and just compensation rights is circular and pointless. If the validation was proper, then, obviously, the road was not his and there was no constitutional violation. If the validation was improper, then the decision will be reversed and, again, there will be no constitutional violation.

B. The County's Findings were documented and supported by the record.

Mr. Sopatyk contends (Opening Brief at 21-22) that the County's Findings were inadequate and not supported by the record. Not so. The record provides full support for the

³⁴ "Admittedly, in making this finding [of non-abandonment] the Commissioners to some extent relied on the absence of proof in proving a negative i.e., non-use and/or non-maintenance. This finding implicates respective burdens of proof." R., p. 30 (Memorandum Decision at 7).

County's decision to validate ACR. For the existence of ACR after the washout, see discussion in footnote 15 at page 20. For continued use to the present times, see footnote 18 at page 22.³⁵

At another point, Mr. Sopatyk complains that the County should have looked at other evidence. Opening Brief at 26. The items he lists (tax assessments and deed documents) have no apparent relevance to this proceeding. In any event, this was an adversarial proceeding, and Mr. Sopatyk has failed to demonstrate their relevancy.³⁶

C. It makes no difference whether the ACR encroaches on federal lands.

Mr. Sopatyk complains that ACR encroaches on federal land. Opening Brief at 24. The record does not support this claim. The only evidence of encroachment is a map submitted by Mr. Sopatyk (Ex. 3, S-2) which appears to show some very slight encroachment. However, the origin, purpose, and basis of exhibit was not explained, nor was the issue of encroachment discussed in the testimony.

³⁵ Mr. Sopatyk further claims in his Opening Brief that by not "citing authority for" each particular paragraph in the Findings, "the Commissioners are only substituting their prejudices and desire in place of actual facts." Opening Brief at 22. For example, Mr. Sopatyk states there is no citation to the record for Finding No. 43 that ACR ran all the way into Montana. Opening Brief at 21. This is another of Mr. Sopatyk's misleading assertions as there is no requirement that the Commissioners cite authority for every conclusion. Further, it is unnecessary for the Commissioners to do so as they already acknowledged at the outset of the Findings that the entire record before the Commission was considered. Ex. 5, (Findings at 3, Finding Nos. 12 and 15). The record contains clear support for the County decision, including the conclusion that ACR existed to the Montana border. (Ex. 4, P-9 (1981 newspaper clipping indicating "citizens of Gibbonsville have just completed the survey of a wagon road . . . into Montana . . . via Anderson Creek and Three Mile.")).

³⁶ Here is the colloquy between counsel for Mr. Sopatyk and Judge Moss:

MR.SAETRUM: And it was interesting . . . that there is never an assessment for the owners of the Anderson Creek placers for any roadwork, yet if indeed that was a public road, there had to be an assessment.

THE COURT: Why do you say there had to be?

MR.SAETRUM: Well, Ms. Benedict, who was the County's historian, said that if it was a public road, the people living on it would be assessed to maintain it.

THE COURT: Is that an assumption or is that a law?

MR. SAETRUM: That was her understanding as to how it worked at the time.

THE COURT: But we don't have any ordinances on that effect, anything else indicating that just – that's what she believed?

MR. SAETRUM: Correct.

Tr., p. 4, l. 19 to p. 5, l. 12.

Whatever the case, the encroachment issue is improper and irrelevant. It is raised too late³⁷ and, in any event, Mr. Sopatyk does not speak for the Forest Service and does not have standing to raise this concern. If the Forest Service objects to this road, it has the ability to protect its interests. In fact, however, the Forest Service has taken the opposite position. The Supervisor of the Salmon-Challis National Forest expressly supported recognition of ACR as an R.S. 2477 road:

In response to your letter of August 24, 2004 related to the Anderson Creek Road, I would like to express the Salmon-Challis National Forest's support for continued public access along this road.

Our research into Anderson Creek Road indicates the following:

1. The road was established prior to the establishment of the National Forest.
2. This road appears to qualify for designation as a public road under RS2477.
3. Although the road terminates on the National Forest, it largely passes through and provides access to public land.
4. This road is not and has not been considered a portion of the National Forest road system.
5. The road has not been maintained by the Forest Service and is unlikely to be a priority for our available road maintenance funds.

Given these findings, and the fact that the Salmon-Challis Forest is one of the landowners along this road, we believe the best interests of the public would be served by designation of the Anderson Creek Road as a County Road in order to provide continued access to and through this area to the National Forest.

Ex. 3, C-3 (Letter of William A. Wood). That should put this argument to rest.

³⁷ Mr. Sopatyk failed to raise the issue of encroachment during the validation proceedings and “[r]eview on appeal is limited to those issues raised before the administrative tribunal.” *Johnson v. Blaine County*, 146 Idaho 916, 920, 204 P.3d 1127, 1131 (2009). “[A]n appellate court will not decide issues presented for the first time on appeal,” and this Court should not now entertain the encroachment argument. *Id.* (citing *Balser v. Kootenai County Bd. of Comm'rs*, 110 Idaho 37, 40, 714 P.2d 6, 9 (1986)).

For that matter, even if the Forest Service opposed the road, that would be of no consequence. R.S. 2477 roads may be created on public land prior to the withdrawal of the land from the public domain.³⁸ Indeed, that is the whole purpose of R.S. 2477.

D. ACR was properly validated as 50-feet wide.

Mr. Sopatyk alleges that the fifty-foot width of ACR is too wide. Opening Brief at 24. In fact, the fifty-foot width is consistent with the presumption established by Idaho statute and with the facts in the record. Where there is no official declaration or survey to the contrary, Idaho law uses a 50-foot width as a default. Idaho Code § 40-605; Idaho Code § 40-2312.³⁹

The case of *Meservey v. Gulliford*, 14 Idaho 133, 93 P. 780 (1908), applied the predecessor of this statute (which also established a 50-foot width) in a case involving a public road created by public use and maintenance under Idaho's road creation statute. This Court held that width of highways established by public use is based on a consideration of circumstances peculiar to each case, but is presumed to be 50 feet, unless facts clearly indicate otherwise. This statute evidently provides the width of a road that is considered reasonably necessary for the convenience of the public generally." *Meservey*, 14 Idaho at 146, 93 P. at 784. "Where there is no other evidence of dedication than mere user by the public, the presumption is not necessarily

³⁸ Mr. Sopatyk contends, "The County, however, cannot validate a road on federal ground." Opening Brief at 24 (citing *French v. Sorensen*, 113 Idaho 950, 957, 751 P.2d 98, 105 (1998)). The *French* case was speaking about validation after the land was reserved. Obviously, that cannot be done. Equally obviously, R.S. 2477 roads can be validated on federal lands if the road became a public road before the land was reserved. To the extent ACR encroaches on public land, the United States, if it chose, could refuse to acknowledge such a validation absent a federal quiet title action. If necessary, a federal quiet title action could be pursued here. Given the federal government's express recognition that ACR qualifies as an R.S. 2477 road and desire to maintain public access via this road, that is unlikely to be necessary.

³⁹ Predecessors of this statute trace the 50-foot minimum back to territorial days. 1887 Revised Stat. of Idaho Territory, title VI, ch. II, § 932; 1885 Gen. Laws of the Territory of Idaho, § 10 at page 165.

limited to the traveled path, but may be inferred to extend to the ordinary width of highways

...⁴⁰ *Meservy*, 14 Idaho at 147, 93 P. at 784.

Moreover, the Court expressly adopted the common law of Utah, which holds that the road created by prescription encompasses the public's right "to use the whole tract as a highway, by widening the traveled part or otherwise, as the increased travel and the exigencies of the public may require." 14 Idaho at 147, 93 P. at 784. Again, the Court emphasized the key point: "However, it must be borne in mind that the statute fixes the width of highways at not less than 50 feet, and common experience shows that width no more than sufficient for the proper keeping up and repair of roads generally." *Meservy*, 14 Idaho at 148, 93 P. at 785.

A 50-foot width for a road by prescription was also recognized in *State v. Berg*, 28 Idaho 724, 155 P. 968 (1916) (public road found to have been created by five years of public use, for the entire width between two fences, not just the traveled portion).

The case of *Rich v. Burdick*, 83 Idaho 335, 362 P.2d 1088 (1961), demonstrates that Idaho law is in accord with the notion that the right of way for a public road may be substantially broader than the road surface itself. The Idaho Supreme Court declared: "Mere non-user of a portion of the total width of a highway over a period of years does not constitute an abandonment, or estop the public from claiming the title and right to the use thereof." *Rich*, 83 Idaho at 345, 362 P.2d at 1094. In this case, the state of Idaho was authorized in widening and improving a highway even where the effect was to require the removal (without compensation) of a gas station owned by the defendant.

Here, the record is replete with evidence that a width of 50 feet is appropriate for ACR.

⁴⁰ The term "user," by the way, is an arcane but correct term for "use."

Record	Relevancy
Ex. 3, C-2 at unnumbered page 7 (Survey No. 1187)	“Road 60 ft. wide” (describing ACR)
Ex. 4, S-4, unnumbered page 76 (1896 survey field survey notes for Anderson Creek Consolidated Placers 1 & 2)	“Road 60 ft. wide” (describing ACR)
Ex. 3, C-4 (original plat map for Gibbonsville Townsite)	“Main Street 75 feet wide” (describing ACR)
Ex. 3, C-5 (Petition for Gibbonsville Townsite)	“that the streets be (75) seventy-five feet wide” (describing ACR)

Obviously, ACR is currently much different both structurally and visually than it was over one hundred years ago. Nevertheless, the County is entitled to validate the road based on its historical width and in accordance with the statutory presumption of a fifty-foot width.

E. The County properly determined that validation of ACR is in the public interest.

Mr. Sopatyk alleges, “The Commissioners failed to determine whether validating ACR was in the public interest.” Opening Brief at 22-23. This is not correct.

In fact, the Commissioners carefully laid out the two-step process for consideration of the public interest. “In making this decision, the County Commission will first determine whether Anderson Creek Road meets the requirements of Idaho law as a public road or right-of-way today. If that decision is in the affirmative, the Commission will next determine whether it is in the public interest for Anderson Creek Road to continue to be a public road or right-of-way.” Ex. 5 (Exhibit B to Findings, Notice at 1-2); Ex. 1, p. 1, l. 25 to p. 2, l. 7 (Tr. 2004 Hearing). This two-step process is as reflected in the Findings, which contained a separate heading on the subject of public interest evaluation. Ex. 5 (Findings at 14, Findings Nos. 91, 92, 93). Another paragraph notes the key public interest criterion that ACR provides access to public land. Ex. 5 (Findings at 7, Finding No. 44).⁴¹ In addition to these four paragraphs, the Findings incorporated

⁴¹ Mr. Sopatyk claims in his brief that this finding is not supported by the record. Opening Brief at 7. Again, not true. See bullet point 3 in the Letter of William A. Wood (Ex. 3, C-3) (quoted in section III.C at page

Exhibit C which set out eight pages of summary of public interest testimony (Ex. 5 (Exhibit C to Findings at 1-8)).⁴²

In comparison to the County's more detailed discussion on the merits, it must be admitted that these four paragraphs provide only a limited discussion of the public interest. For whatever reason, the County relied primarily on its inclusion of Exhibit C for its discussion of public interest values.

After all, the validation statute simply requires the County to "determine whether validation of the highway or public right-of-way is in the public interest and [to] enter an order." Idaho Code § 40-203A(3). Unlike the Local Land Use Planning Act, there is no requirement for a "reasoned statement" explaining the basis of the decision. Idaho Code § 67-6535(b). In other words, the County is not required to explain its reasoning in detail.⁴³ Taken together, the Findings (including attached Exhibit C) and the County's Notice (Exhibit B to Findings) are sufficient to demonstrate that the County considered the matter and concluded that the public interest was satisfied.

34). See also summary of statement of Doug Gupton (Ex. 5 (Exhibit C to Findings at 4)) and summary of statements of Mary and Roger Stover (Ex. 5 (Exhibit C to Findings at 3)). Apparently, Mr. Sopatyk believes that the County is required to support every statement in its Findings with citations to the record. There is no such requirement.

⁴² For example, see summary of statement of Doug Gupton (Ex. 5 (Exhibit C to Findings at 4)). ("testified as to the importance of the road for access to recreational areas on the Forest lands"); summary of statement of Dana Ortlieb (Ex. 5 at 4) ("spoke to the importance of keeping the road open"); summary of statement of Chloe A. Ross (Ex. 5 at 4) ("For years it has lent public access to Anderson Mountain, Keystone ridge, Smithy Creek, and many other favorite and well-known spots"; also important for "search and rescue"; "It is the usefulness of the road itself and the fact that if it were taken away the community and public would be robbed of a precious resource."); summary of statement by Keating Outfitters (Ex. 5 at 2) (ACR used for "accessing hunting and fishing areas for their clients"); summary of statement of Richard Shank (Ex. 5 at 2) ("access to Anderson Mountain and mountain recreation area and to Keystone Ridge"); summary of statement of Toby Friedman (Ex. 5 at 2) ("deep desire that it remain a public and open road just like it has always been"); summary of statement of Julia Pratt Randolph (Ex. 5 at 182) ("husband and son-in-law also used the road at one point to rescue a woman"); summary of statements of Mary and Roger Stover (Ex. 5 at 3) ("used it over the course of the last 50 years for access to Forest Service grounds, recreation, motorcycle riding, walking, and fishing"); summary of statement of Norma Scarborough (Ex. 5 at 3) ("used the road over the course of 54 ½ years that she had lived there: horseback riding, walking, hiking, fishing").

Idaho Code § 40-203A sets out the exclusive bases for overturning the County's decision. Failure to thoroughly describe its reasoning as to the public interest is not among them. The only question for this Court is whether the record, taken as a whole, contained sufficient "reliable, probative and substantial information" to support the County's decision to validate and whether the County's decision was characterized by "abuse of discretion or clearly unwarranted exercise of discretion." Idaho Code §§ 40-208(7)(e) and (f). The record amply supports the County's decision that the public interest will be served by keeping ACR open.⁴⁴ An excellent example is the letter from the Forest Supervisor of the Salmon-Challis National Forest quoted in section III.C at page 34. This alone is ample evidence to support the County's decision under the "clearly erroneous" or "arbitrary and capricious" tests cited above. After all, the Idaho Legislature itself determined in 1963 that maintaining public access to public lands is a sufficiently important basis to immunize such roads from passive abandonment.⁴⁵

F. The allegation of bias against a former commissioner is unfounded and irrelevant.

Mr. Sopatyk suggests former Commissioner Proksch was biased because he "had property interests in the Gibbonsville area which may be affected by the validation and

⁴³ If, however, the Court were to find that the County's explanation of its decision is inadequate, the remedy would be to remand for a fuller explanation.

⁴⁴ In addition to the summary of public interest testimony summarized in Exhibit C to the Findings, note the following direct testimony and exhibits: Testimony of Julia Randolph, Ex. 1, p. 128, ll. 15-23; Testimony of Mary Jordan Stover, Ex. 1, p. 140, ll. 17-21, p. 143, ll. 5-17, p. 150, ll. 16-18; Testimony of Roger Stover, Ex. 1, p. 146, ll. 15-21, p. 150, l. 19; Testimony of Doug Kelptin, Ex. 1, p. 152, ll. 17-25, p. 153, ll. 1-7; Testimony of Bob Gervais, Ex. 1, p. 156, ll. 25, p. 157, ll. 1-5, p. 160, ll. 21-25, p. 161, ll. 1-5; Testimony of Dana Roger Ortlieb, Ex. 1, p. 161, ll. 13-18, p. 164, ll. 22-25, p. 165, ll. 1-13; Testimony of Norma Scarborough, Ex. 1, p. 172, ll. 20-25; Testimony of Bob Vouvier, Ex. 1, p. 177, ll. 18-25, p. 178, l. 1-2; Letter of William A. Wood, Ex. 3, C-3; Notarized Letter from Marcus C. Jordan, Ex. 3, C-22-B; Affidavit of Larry Webb, Ex. 3, C-22-C; Affidavit of Robert Stenersen, Ex. 3, C-22-E; Notarized Statement of Sue Ann Keating, Ex. 3, C-22-F; Notarized Statement of Richard Shank, Ex. 3, C-22-G; Affidavit of Toby Friedman, Ex. 3, C-22-H; Affidavit of Alfred Stenersen, Ex. 3, C-22-I; Affidavit of Barbara Stenersen, Ex. 3, C-22-J; Letter from Norma Scarborough, Ex. 4, P-20.

⁴⁵ S.B. 242, 1963 Idaho Sess. Laws ch. 267, § 1 (then codified at Idaho Code § 40-104; later codified at Idaho Code § 40-203(4); repealed by S.B. 1108 in 1993).

improvement of ACR.” Opening Brief at 25.⁴⁶ This allegation is without merit for four reasons. First, the factual premise is wrong. Former Commissioner Proksch had no improper interest in the ACR validation proceeding.⁴⁷ Next, as a technical matter, the statute Mr. Sopatyk alleges was violated does not apply to validation proceedings.⁴⁸ Third, even if Mr. Proksch were biased (and he was not), he did not cast the deciding vote, and no remand is appropriate under *Floyd v.*

⁴⁶ Mr. Sopatyk also states, “Additionally, it appears that Mr. Proksch did not raise his property interests to the Commissioners during the time they considered the record in rendering the January 24, 2005, Decision” Opening Brief (referencing Ex. 4, S-C (Proksch Deposition, p. 37, ll. 10-15, p. 38, l. 3)). This is yet another blatant misstatement of the record. The only testimony was that, at the time the deposition was taken, Mr. Proksch did not recall what disclosures had been made.

Mr. Sopatyk also states, “First, the petition for validation was initially filed by a former County Prosecutor” Opening Brief at 25 (citing Ex. 1, p. 266, ll. 9-15 (Tr. 2004 Hearing)). The reference is not to testimony of a witness but to a statement by counsel for Mr. Sopatyk in which counsel speculates about “the genesis of this entire process.” Ex. 1, p. 266, l. 18 (Tr. 2004 Hearing). There is no testimonial evidence to support counsel’s speculation. Again, Mr. Sopatyk has misled the Court.

⁴⁷ Mr. Proksch owns two parcels that Mr. Sopatyk alleges will be benefited by validation of ACR. Mr. Proksch owns a one-quarter interest in an estate parcel with his three sisters. The property is about one to one and one-half miles from ACR. Ex. 4, S-C (Proksch Deposition, p. 9, l. 15, p. 11, ll. 5-6, p. 26, ll. 10-12). In addition, he and his wife own a property near Ditch Creek. Ex. 4, S-C (Proksch Deposition, p. 9, ll. 11-21, p. 11, ll. 5-6, p. 15, ll. 1-2). The Ditch Creek property is even further from ACR, about four to six miles away. Ex. 4, S-C (Proksch Deposition, p. 15, ll. 5-8). Although the estate parcel could be accessed via ACR, this is not the only means of access. Indeed, a portion of the estate parcel is bordered by Highway 93. Ex. 4, S-C (Proksch Deposition, p. 11, ll. 19-22, p. 12, ll. 3-4). Moreover, the Ditch Creek parcel is accessed by heading up Hughes Creek and then up Ditch Creek. Thus, the value of this property will also not be affected by the validation of ACR. Ex. 4, S-C (Proksch Deposition, p. 15, ll. 5-8). Mr. Proksch did not suggest anywhere in his deposition that either of the properties will be benefited by making ACR a public road. Mr. Sopatyk’s only “evidence” is the testimony of Joe Corlett who has never even visited the sites. Ex. 2 (Tr. Public Hearing, June 25, 2007 at 3-4). His conjecture that validation would increase the value of the property failed to take into account the alternative access available to the property. Moreover, the Commissioners reviewed the evidence presented by Mr. Sopatyk and expressly stated, in their November 13, 2007 *Supplemental Findings of Fact and Conclusions of Law* that “no evidence was presented to show that Commissioner Proksch, who voted originally to endorse the validation of Anderson Creek Road, had any conflict” *Supplemental Findings of Fact and Conclusions of Law*, at 1. We have discovered at the last moment that this document is not in the record on this appeal. Counsel will file a motion to augment.

⁴⁸ Mr. Sopatyk’s allegation of violation of Idaho Code § 31-807A also fails for a significant technical reason—the statute does not even apply to road validations. Rather, it applies only to purchase and sale transactions and contracts on behalf of a county: “No member of the board must be interested, directly or indirectly, in property purchased for the use of the county, nor in any purchase or sale of property belonging to the county, nor in any contract made by the board or other person on behalf of the county, for the erection of public buildings, the opening or improvement of roads, or the building of bridges, or for other purposes unless otherwise authorized by law.” Idaho Code § 31-807A (emphasis added). Mr. Sopatyk emphasized the “opening or improvement of roads” language but failed to realize that it is only relevant in the context of a contract. This is a road validation, not a “contract made by the board . . . for . . . the opening or improvement of roads.” Thus, this statute does not apply to the present situation.

Board of Commissioners of Bonneville County, 137 Idaho 718, 52 P.3d 863 (2002).⁴⁹ Finally, Mr. Proksch was replaced by a new commissioner after the 2006 election. Thereafter, the County Commission voted again unanimously to validate the road, thus rendering moot any allegation with respect to the former commissioner.⁵⁰

IV. THE COUNTY IS ENTITLED TO ATTORNEY FEES; MR. SOPATYK IS NOT.

A. The Court's recent decisions interpreting the 2010 amendment to Idaho Code § 12-117 put in doubt the County's claims under that statute.

The Court's decisions in *Smith v. Washington County*, 2010 WL 3895341 (Idaho 2010), and *Laughy v. Idaho Dep't of Transportation*, 2010 WL 4297807 (Idaho 2010), appear to be at odds with the County's ability to recover attorney fees under Idaho Code § 12-117. These decisions interpret the 2010 amendment to the statute which, in turn, was a response to the Court's decision in *Rammell v. Idaho State Dep't of Agriculture*, 147 Idaho 415, 210 P.3d 523

⁴⁹ Even if there were a showing of bias, remand may not be required where the biased commissioner did not cast a deciding vote. *Floyd v. Board of Commissioners of Bonneville County*, 137 Idaho 718, 52 P.3d 863, 870-71 (2002). If the decision would have been the same without the biased vote, there are three factors to consider: (1) whether the other members were aware of the bias, or the interest was disclosed; (2) the degree of the biased individual's participation; and (3) the extent of the biased interest. *Floyd*, 137 Idaho at 726, 52 P.3d at 871 (relying on *Griswald v. City of Homer*, 925 P.2d 1015 (Alaska 1996)). In *Floyd*, the Court concluded that "due process would be satisfied . . . by simply disregarding Commissioner Christensen's vote rather than nullifying the decision and remanding the case for rehearing or reconsideration by an entirely new body of Commissioners." *Floyd*, 137 Idaho at 726, 52 P.3d at 871. The Idaho Supreme Court allowed the decision of the Commissioners in *Floyd* to stand, in the face of proven bias, and favored this result over the option of nullifying and remanding the decision. Applying the three part test above, it is conceded that Mr. Proksch played a significant role in the hearing as Chairman and Hearing Officer. However, the other two prongs strongly tilt in favor of no remand. First, there is no showing that the other commissioners were aware of the parcels in question or influenced by this fact. Second, the extent of the alleged bias is small. Indeed, the case for Mr. Proksch's bias is not nearly as strong as the bias evidence in *Floyd*, which was still not deemed enough to overturn the Commission's decision. Accordingly, if the Court determines there was bias, the appropriate result is to ignore his vote resulting in 2-0 unanimous decision.

⁵⁰ Most importantly, the entire matter is now moot. Mr. Proksch is a former Commissioner and no longer a participant in the validation proceeding. On August 13, 2007, following his departure, the new County Commissioners voted again—unanimously—to validate the road. Thus, any remedy of remanding the matter to the Commission for a new vote has already been achieved. In the August 13, 2007 public hearing, each of the three current Commissioners (Robert Cope, Richard Snyder and Brett S. Barsalou) attested individually to having reviewed the entire record, having no improper interest in the validation of ACR and willing to vote again on a motion to validate ACR as either public or not public. Each Commissioner subsequently voted "yes" to validate ACR as a public road on a renewed motion for determination. This decision was made unanimously, without any improper bias, and should be upheld. Ex. 2 (Tr. Public Hearing, August 13, 2007).

(2009). Prior to *Rammell*, the Court interpreted Idaho Code § 12-117 as allowing the award of attorney fees in administrative proceedings and in appeal of administrative proceedings.

Rammell overturned that line of cases, making attorney fee awards available in appeals from administrative cases, but not in the administrative cases themselves. The Legislature responded by clarifying that attorney fees awards may be made in administrative matters as well.

Owing to what can fairly be described as incompetent legislative drafting, the resulting amendment may be read to have removed the courts' authority to award attorney fees in appeals of administrative cases. The result appears to have been unintended. Review of the legislative history (which is available at www.idaho.gov) (House Judiciary, Rules and Administrative Committee, Feb. 3, 2010, and Senate Judiciary and Rules Committee, Feb. 15, 2010), as well as the bill's statement of purpose suggest that the intent of the legislation was to expand the availability of attorney fees, not to restrict it. Unfortunately, the Legislature's admittedly poor choice of words led to the Court's decisions cited above. That interpretation is not unreasonable. Nevertheless, the County urges the Court to reconsider its construction of the 2010 amendment and substitute a more liberal interpretation that would better achieve the apparent purpose of the legislation—which was to expand the availability of attorney fees.

Should the Court find that Idaho Code § 12-117 is available to the County,⁵¹ the District Court's denial of attorney fees should be reversed, and attorney fees should be awarded on this appeal as well. Section 12-117(1) states the prevailing party is entitled to recover its attorney fees if the opposing party "acted without a reasonable basis in fact or law." Idaho Code § 12-117(1). The District Court found that Mr. Sopatyk did not act without a reasonable basis because

⁵¹ The attorney fee statute could be available either by applying a more liberal reading to the 2010 amendment or by determining not to apply the 2010 amendment retroactively. The 2010 statute states that it is to be applied retroactively, but that was plainly done in order to expand the availability of attorney fees to cases then

“[a]ttempts to recreate what occurred over one hundred years ago lend itself to reasonable disputes.” R., pp. 37-38 (Memorandum Decision at 14-15).⁵² The County agrees it has been difficult to recreate such extensive history, but maintains the history compiled by the County’s historian is sufficiently clear that Mr. Sopatyk’s disputes are unreasonable. The purpose of this statute is to serve “as a deterrent to groundless or arbitrary” litigation and to provide “a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges.” *Reardon v. Magic Valley Sand & Gravel, Inc.*, 140 Idaho 115, 118, 90 P.3d 340, 343 (2004). The County fits these intentions exactly, as it is forced to continue spending scarce taxpayer money at a time of dire budgetary constraints defending against Mr. Sopatyk’s groundless claims. The County has protected the public interest and defended against Mr. Sopatyk’s unsupported challenges for years. The clear legal and factual basis for the County’s action was set out in extraordinarily complete form in its Findings. That should have been the end of the matter. That exposition occurred again at the District Court level and, again, Mr. Sopatyk’s arguments were shown to be without any foundation. He now pursues this appeal with a brief that is little more than a word-for-word recital of the failed arguments he made to the District Court, continuing to ignore the detailed explanation offered by the County in the briefing below. He tops this off with a number of misleading and inaccurate references to the record. (See footnote 4 at 10, footnote 5 at 12, footnote 6 at 13, footnote 11 at 17, footnote 17 at 22, footnote 24 at page 26, footnote 35 at 34, footnote 41 at 36, and footnote 46 at 41.) Fees are available under Idaho Code § 12-117 both before the district court and this Court. *Lane Ranch*

pending. There is a good argument that any restrictive aspect of the statute should not (and constitutionally cannot) be applied retroactively.

⁵² This Court “exercises free review over the decision of the district court in applying Idaho Code § 12-117,” and should grant the County its fees. *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005).

Partnership v. City of Sun Valley, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007). For these reasons, the County meets the standard set forth in Idaho Code § 12-117(1), and is entitled to its attorney fees incurred to date.

B. The County is entitled to its fees under I.A.R. 11.2.

The County is also entitled to its fees under I.A.R. 11.2, because Mr. Sopatyk and/or his counsel acted with an improper purpose in bringing this appeal.⁵³ Recently, in *Lattin v. Adams County*, this Court granted attorney fees pursuant to I.A.R. 11.2 and explained that “[a]lthough an attorney’s purpose in filing an appeal may not always appear clear from the record, this Court can infer intent and purpose from the attorney’s actions and the surrounding circumstances.” *Lattin v. Adams County*, 149 Idaho 497, 236 P.3d 1257, 1264 (2010) (citing *Fritts v. Liddle & Moeller Constr., Inc.*, 144 Idaho 171, 176, 158 P.3d 947, 952 (2007) (quoting *Neihart v. Universal Joint Auto Parts, Inc.*, 141 Idaho 801, 803, 118 P.3d 133, 135 (2005))). In *Lattin*, this Court held that a signed legal document violates Idaho Appellate Rule 11.2 if it is “not well grounded in fact,” “not warranted by existing law or a good-faith extension, modification, or reversal of existing law,” and if it “was interposed for an improper purpose.” *Lattin v. Adams County*, 149 Idaho 497, 236 P.3d 1257, 1264 (2010). See also *Read v. Harvey*, 147, Idaho 364, 371, 209 P.3d 661, 668 (2009).

The record, the pleadings, and the litigation history clearly show that Mr. Sopatyk continues to lack the proper factual basis for bringing this appeal. (See discussion above with respect to Idaho Code § 12-117.) It is apparent that Mr. Sopatyk has forced this litigation to

⁵³ In contrast to Mr. Sopatyk, the County made its attorney fee claim in its first appellate brief to the District Court. At the time, it only identified Idaho Code § 12-117, which was then a proper basis for an award. Given the unforeseen change in law, the County should now be allowed to identify the additional basis of I.A.R. 12.2. If the Court determines that such a request should be made by motion, the County asks that this portion of the brief be deemed such a motion. In any event, the Court has authority to award attorney fees under this provision *sua sponte*.

continue over many years in the hope of wearing down the County and forcing it to abandon its position not because it is wrong but for budgetary reasons. He came very close to succeeding. If he is not required to pay for his costly and dilatory appeals, others will be encouraged to play the same game of chicken with county officials.

C. Sopatyk is not entitled to attorney fees as he failed to make an appropriate and timely request.

Mr. Sopatyk did not seek attorney fees on his judicial review to the District Court, but he seeks them now. Even if he were to prevail, Mr. Sopatyk is not entitled to the attorney fees. First, he cited the wrong authority.⁵⁴ Second, he failed to state the basis for the claim.⁵⁵ Third, the request comes too late.⁵⁶

⁵⁴ Idaho Code § 12-121 and Idaho Rule of Civil Procedure 54(e)(1). Idaho Code § 12-121 allows a grant of attorney fees to the prevailing party in any civil action, and is limited to actions initiated by a complaint. It does not apply in cases such as this administrative appeal initiated by petition. *Johnson v. Blaine County*, 146 Idaho 916, 204 P.3d 1127 (2009). Similarly, I.R.C.P. 54(e)(1) allows an award of attorney fees in “any civil action,” and only applies to actions initiated by a complaint. *Lowery v. Bd. Of County Comm’rs for Ada County*, 117 Idaho 1079, 1081-82, 793 P.2d 1251, 1253-54 (1990).

⁵⁵ Idaho Appellate Rule 41(a) requires that the attorney fees request be made “in the first appellate brief . . . as provided by Rules 35(a)(5) and 35(b)(5).” These rules require the party to “state the basis for the claim.” Mr. Sopatyk’s request fails because it does not state any basis. Indeed, the request is devoid of any argument as it merely consists of a partial unexplained quotation. This is insufficient. “[A] request for attorney fees should alert the other party to the basis upon which attorney fees are requested in order that the other party may have a sufficient opportunity to object.” *Mortensen v. Stewart Title Guaranty Co.*, 149 Idaho 437, 235 P.3d 387, 398 (2010) (citing *Bingham v. Montane Res. Assocs.*, 133 Idaho 420, 424, 987 P.2d 1035, 1039 (1999)). For Mr. Sopatyk to be entitled to recover his fees on appeal, “authority and argument establishing a right to fees must be presented in the first brief,” as “citation to statutes and rules authorizing fees, without more, is insufficient.” *Borley v. Smith*, 149 Idaho 171, 233 P.3d 102, 118 (2010). *See also Goldman v. Graham*, 139 Idaho 945, 88 P.3d 764 (2004). Mr. Sopatyk’s request lacks argument, is grossly insufficient, and should be excluded from this Court’s review.

⁵⁶ Mr. Sopatyk’s request for attorney fees fails is because he did not make the request in his “first appellate brief,” which was to the District Court. Accordingly, his request on this second appeal is too late. The judicial review to the District Court was subject to Idaho Rule of Civil Procedure 84(r), which made the Idaho Appellate Rules applicable to apply to any procedure not specified in Rule 84. Because I.R.C.P. 84 does not prescribe a method for requesting attorney fees, I.A.R. 41(a) was applicable.


CONCLUSION

For each of the reasons discussed above, the County's decision recognizing ACR as a public road should be affirmed and the County should be awarded its attorney fees incurred defending these frivolous appeals.

DATED this 30th day of November, 2010.

Respectfully submitted,

GIVENS PURSLEY LLP

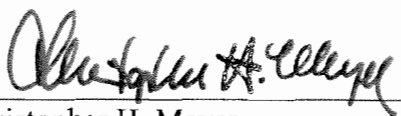
By 
Christopher H. Meyer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of November, 2010, the foregoing was served as follows:

Rodney R. Saetrum
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general@saetrumlaw.com

<input checked="" type="checkbox"/>	U. S. Mail
<input type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile
<input checked="" type="checkbox"/>	E-mail



Christopher H. Meyer

APPENDIX A: INDEX TO IDAHO ROAD CREATION AND ABANDONMENT STATUTES

Statutory language shown in quotations marks.
 Redlining shows changes made by session laws.
 Amendments affecting only other part of statute are omitted here.

Quick Reference to Citations				
Quick Cites	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>Today: I.C. §§ 40-106, 40-109(5), 202(3), 40-204A.</p> <p>History: Territory Laws, at p. 578, § 1 (1864). Territory Laws, at p. 677, § 1 (1875). — break in history — Territory Laws, at p. 277, § 1 (1881). Territory Laws, at p. 162, § 1 (1885). — break in history — Rev. Stat. of Idaho Terr. §§ 850, 851 (1887). Idaho Sess. Laws at p. 12 (1893). I.C. Ann. §§ 1137, 1138 (1901). 1 Idaho Code Ann. §§ 874, 875 (1908). Idaho Sess. Laws ch. 55 (1911). 1 Compiled Laws §§ 874, 875 (1918). 1 Compiled Stat. §§ 1302, 1304 (1919). 39 I.C. Ann. §§ 39-101, 39-103 (1932). Idaho Code §§ 40-101, 40-103 (1948). Idaho Sess. Laws ch. 82 (1950). Idaho Sess. Laws ch. 93 (1951). I.C. §§ 40-103, 40-107 (1961). I.C. §§ 40-109(5), 40-202 (1985). I.C. § 40-202(3) (1986). I.C. §§ 40-109(5), 40-202(3) (1988). I.C. § 40-202(3) (1992). I.C. §§ 40-106, 40-107 (1993). — break in history — I.C. § 40-204A (1993).</p>	<p>Today: The operative provisions of I.C. § 40-203(4) were repealed in 1993. I.C. § 40-204A.</p> <p>History: Rev. Stat. of Idaho Terr. § 852 (1887). I.C. Ann. § 1139 (1901). 1 Compiled Laws § 876 (1908). 1 Compiled Laws § 876 (1918). 1 Compiled Stat. § 1305 (1919). I.C. Ann. § 39-104 (1932). I.C. § 40-104 (1948). I.C. § 40-104 (1963). I.C. § 40-203 (1985). I.C. § 40-203(4) (1986). I.C. § 40-203(4) (1993). — break in history — I.C. § 40-204A (1993).</p>	<p>Today: I.C. §§ 40-203(1), 40-604(4), 40-203A.</p> <p>History—General Authority: Rev. Stat. of Idaho Terr. § 870 (1867). I.C. Ann. § 1145 (1901). I.C. Ann. § 882 (1908). 1 Compiled Stat. § 1312 (1919). I.C. Ann. § 39-401 (1932). I.C. § 39-401 (1943). I.C. § 40-501(1948). — break in history — Idaho Sess. Laws ch. 82 (1950). Idaho Sess. Laws ch. 93 (1951). I.C. § 40-133(d) (1961). — break in history — I.C. § 40-604(4) (1985). I.C. § 40-604(4) (1993).</p> <p>History—Specific Procedures: I.C. § 40-104 (1963). I.C. § 40-203(1) (1986). I.C. § 40-203(1) (1993).</p>	<p>Today: I.C. § 40-1310(5).</p> <p>History: Idaho Sess. Laws ch. 55 (1911). 1 Compiled Laws § 62:18 (1918). Idaho Comp. Stat. § 1510 (1919). I.C. Ann. § 39-1524 (1932). I.C. § 40-1614 (1948). I.C. § 40-1614 (1963). I.C. § 40-1310(5) (1985). I.C. § 40-1310(5) (1993).</p>

OVERVIEW				
	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>Despite numerous recodifications and minor changes, the basic principles in the road creation statute have been quite stable from territorial days to the present. The basic statutory format of today's legislation was adopted in the 1887. Codification of territorial laws. It was amended in 1893 to add the maintenance requirement. Its basic provisions have remained unchanged since then (except for a requirement that the road by "opened" added in 1992).</p> <p>The law since 1893 has provided two methods of road creation: Method 1 (formal action): <u>"Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways."</u> Method 2 (public use & maintenance): <u>"Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways."</u></p> <p>In the current codification, these provisions are repeated in the definition section (section 40-109(5)) and in the substantive section (section 40-202(3)).</p> <p>In 1993 (H.B. 388) the Legislature adopted a new section 204A which declared that "construction and first use" are sufficient to create R.S. 2477 rights-of-way.</p>	<p>Idaho's first abandonment statute was adopted in 1887 (except for a very limited provision contained in the 1885 legislation pertaining to road that were not opened after four years). It is identified in this outline under the heading "passive abandonment" because abandonment was based on the absence of use and maintenance rather than affirmative official action declaring an abandonment. Some courts and commentators refer to this as "informal abandonment."</p> <p>The passive abandonment statute has been restricted and narrowed repeatedly, and was finally repealed in 1993.</p> <p>In 1963 the statute was amended (H.B. 15) to make it applicable only to roads created by prescription, that is, roads created under Method 2 of the Road Creation Statute. Arguably, this merely codified prior law: see discussion under H.B. 15.</p> <p>In the same year, S.B. 267 established mandatory formal procedures for abandonment of roads providing access to public lands.</p> <p>See, <i>Floyd v. Board of Comm'rs of Bonneville County</i> ("Floyd II"), 137 Idaho 718, 52 P.3d 863 (2002), regarding the interaction between the passive abandonment statute and formal abandonment provisions.</p> <p>In 1993 (S.B. 1108) the Legislature repealed the passive abandonment provision altogether.</p> <p>In the same year, H.B. 388 added a new section 204A dealing with R.S. 2477 rights-of-way. Among other things, it</p>	<p>In this outline, "formal abandonment" refers to mechanisms for abandonment by affirmative, official declaration.</p> <p>Idaho's first formal abandonment statute was enacted in 1887.</p> <p>For years, separate provisions set out the general authority of county commissions (now section 40-604(4)) and highway districts (now section 40-1310(5)). Originally, these statutes provided little guidance as to what sort of formal action was required. For example, until 1961, the statute simply required action "by proper ordinances." From 1951 until 1993, the statute required a public interest finding.</p> <p><i>Nicolaus v. Bodine</i> (1966) construed section 40-501 to require formal findings that the road is no longer necessary.</p> <p>After its amendment in 1963, the passive abandonment statute (then section 40-104) also set out a specific requirement for formal abandonment when the road provided public access. In the same year, an identical requirement was added for highway districts. (Then section 40-1614, now section 1310(5).)</p> <p>In 1986, the Legislature set out detailed abandonment procedures for <u>all</u> roads, applicable to both counties and highway districts. Idaho Code § 40-203(1).</p> <p>For many years, the general provisions existed alongside the specific procedural requirements.</p> <p>In 1993, the Legislature amended section 40-604(4) to incorporate the same procedures for abandonment set out in section 40-203.</p>	<p>Beginning in 1911, highway districts (like county commissioners) have had general authority to abandon roads by official action. Initially, no particular procedures were set out.</p> <p>In <i>Nicolaus v. Bodine</i> (1966), the Court held that road districts must comply not only with section 40-1614, but also section 40-501 (applicable to county commissioners).</p> <p>In 1963 specific procedures were established for roads accessing public lands. (This paralleled a similar provision in then section 40-104; see column to left.)</p> <p>In 1986, the Legislature enacted new formal abandonment provisions for all roads at section 40-203(1) (see column to the left).</p> <p>In 1993, section 40-1310(5) was amended to state that the section 40-203(1) procedures are mandatory for highway districts. That is, the general abandonment authority did not authorize an end run around the section 40-203(1) procedures. Thus, the loop was closed for both county commissions and highway districts.</p> <p>Today, section 40-203(1) sets out the sole statutory mechanism for the abandonment and vacation of public roads and rights-of-way.</p> <p>In 1993, the Legislature amended section 40-1305(5) to incorporate the same procedures for abandonment set out in section 40-203.</p>

OVERVIEW				
	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
		states that abandonment principles do not apply to R.S. 2477 rights-of-way. See note to left.		

Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Idaho Code § 40-202(3).</p> <p>QUOTE: "40-202. Designation of highways and public rights-of-way. — " (3) Highways laid out, recorded and opened as described in subsection (2) of this section, by order of a board of commissioners, and all highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways. If a highway created in accordance with the provisions of this subsection is not opened as described in subsection (2) of this section, there shall be no duty to maintain that highway, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs, until the highway is designated as a part of the county or highway district system and opened to public travel as a highway."</p> <hr/> <p>CITE: Idaho Code § 40-106(3).</p> <p>QUOTE: "40-106. Definitions — E. " (3) 'Expense of the public' means the expenditure of funds for roadway maintenance by any governmental agency, including funds expended by any agency of the federal government, so long as the agency allows public access over the roadway on which the funds were expended and such roadway is not located on federal or state-owned land."</p>	<p>NOTE: There is no passive abandonment statute in force today.</p>	<p>CITE: Idaho Code § 40-203.</p> <p>QUOTE: "40-203. Abandonment and vacation of county and highway district system highways or public rights-of-way. " (1) A board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, shall use the following procedure to abandon and vacate any highway or public right-of-way in the county or highway district system including those which furnish public access to state and federal public lands and waters: " (a) The commissioners may by resolution declare its intention to abandon and vacate any highway or public right-of-way considered no longer to be in the public interest. " (b) Any resident, or property owner, within a county or highway district system including the state of Idaho, any of its subdivisions, or any agency of the federal government may petition the respective commissioners for abandonment and vacation of any highway or public right-of-way within their highway system. The petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings. " (c) The commissioners shall establish a hearing date or dates on the proposed abandonment and vacation. " (d) The commissioners shall prepare a public notice stating their intention to hold a public hearing to consider the proposed abandonment and vacation of a highway or public right-of-way which shall be made available to the public not later than thirty (30) days prior to any hearing and mailed to any person requesting a copy more than</p>	<p>CITE: Idaho Code § 40-1310(5).</p> <p>QUOTE: "40-1310. Powers and duties of highway district commissioners " (5) The highway district has the power to receive highway petitions and lay out, alter, create and abandon and vacate public highways and public rights-of-way within their respective districts under the provisions of sections 40-202, 40-203 and 40-203A, Idaho Code. Provided however, when a public highway, public street and/or public right-of-way is part of a platted subdivision which lies within an established county/city impact area or within one (1) mile of a city if a county/city impact area has not been established, consent of the city council of the affected city, when the city has a functioning street department with jurisdiction over the city streets, shall be necessary prior to the granting of acceptance or vacation of said public street or public right-of-way by the highway district board of commissioners."</p>

Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Idaho Code § 40-109(5)</p> <p>QUOTE: "40-109. Definitions – H. ... "(5) 'Highways' mean roads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public. Highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, adjacent lands or interests lawfully acquired, pedestrian facilities, and any other structures, works or fixtures incidental to the preservation or improvement of the highways. Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways."</p> <p>CITE: Idaho Code § 40-204A.</p> <p>QUOTE: "40-204A. Federal land rights-of-way. — "(1) The state recognizes that the act of construction and first use constitute the acceptance of the grant given to the public for federal land rights-of-way, and that once acceptance of the grant has been established, the grant shall be for the perpetual term granted by the congress of the United States. "(2) The only method for the</p>		<p>three (3) working days after any such request.</p> <p>"(e) At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway or public right-of-way, the commissioners shall mail notice by United States mail to known owners and operators of an underground facility, as defined in section 55-2202, Idaho Code, that lies within the highway or public right-of-way.</p> <p>"(f) At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway or public right-of-way, the commissioners shall mail notice to owners of record of land abutting the portion of the highway or public right-of-way proposed to be abandoned and vacated at their addresses as shown on the county assessor's tax rolls and shall publish notice of the hearing at least two (2) times if in a weekly newspaper or three (3) times if in a daily newspaper, the last notice to be published at least five (5) days and not more than twenty-one (21) days before the hearing.</p> <p>"(g) At the hearing, the commissioners shall accept all information relating to the proceedings. Any person, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may appear and give testimony for or against abandonment.</p> <p>"(h) After completion of the proceedings and consideration of all related information, the commissioners shall decide whether the abandonment and vacation of the highway or public right-of-way is in the public interest of the highway jurisdiction affected by the abandonment or vacation. The decision whether or not to abandon and vacate the highway or public right of way shall be written and shall be supported</p>	

Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>abandonment of these rights-of-way shall be that of eminent domain proceedings in which the taking of the public's right to access shall be justly compensated. Neither the mere passage of time nor the frequency of use shall be considered a justification for considering these rights-of-way to have been abandoned.</p> <p>"(3) All of the said rights-of-way shall be shown by some form of documentation to have existed prior to the withdrawal of the federal grant in 1976 or to predate the removal of land through which they transit from the public domain for other public purposes. Documentation may take the form of a map, an affidavit, surveys, books or other historic information.</p> <p>"(4) These rights-of-way shall not require maintenance for the passage of vehicular traffic, nor shall any liability be incurred for injury or damage through a failure to maintain the access or to maintain any highway sign. These rights-of-way shall be traveled at the risk of the user and may be maintained by the public through usage by the public.</p> <p>"(5) Any member of the public, the state of Idaho and any of its political subdivisions, and any agency of the federal government may choose to seek validation of its rights under law to use granted rights-of-way either through a process set forth by the state of Idaho, through processes set forth by any federal agency or by proclamation of user rights granted under the provisions of the original act, Revised Statute 2477.</p> <p>"Persons seeking to have a federal land right-of-way, including those which furnish public access to state and federal public lands and waters, validated as a highway or public right-of-way as part of a county or highway official highway system, shall follow the procedure outlined in section</p>		<p>by findings of fact and conclusions of law.</p> <p>"(i) If the commissioners determine that a highway or public right-of-way parcel to be abandoned and vacated in accordance with the provisions of this section has a fair market value of twenty-five hundred dollars (\$2,500) or more, a charge may be imposed upon the acquiring entity, not in excess of the fair market value of the parcel, as a condition of the abandonment and vacation; provided, however, no such charge shall be imposed on the landowner who originally dedicated such parcel to the public for use as a highway or public right-of-way; and provided further, that if the highway or public right-of-way was originally a federal land right-of-way, said highway or public right-of-way shall revert to a federal land right-of-way.</p> <p>"(j) The commissioners shall cause any order or resolution to be recorded in the county records and the official map of the highway system to be amended as affected by the abandonment and vacation.</p> <p>"(k) From any such decision, a resident or property holder within the county or highway district system, including the state of Idaho or any of its subdivisions or any agency of the federal government, may appeal to the district court of the county in which the highway or public right-of-way is located pursuant to section 40-208, Idaho Code.</p> <p>"(2) No highway or public right-of-way or parts thereof shall be abandoned and vacated so as to leave any real property adjoining the highway or public right-of-way without access to an established highway or public right-of-way.</p> <p>"(3) In the event of abandonment and vacation, rights-of-way or easements may be reserved for the continued use of existing sewer, gas, water, or similar pipelines and appurtenances, or other</p>	

Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>40-203A, Idaho Code.</p> <p>"Neither the granting of the original right-of-way nor any provision in this or any other state act shall be construed as a relinquishment of either federal ownership or management of the surface estate of the property over which the right-of-way passes.</p> <p>"(6) Persons seeking acknowledgement of federal land rights-of-way shall file with the county recorder the request for acknowledgement and for any supporting documentation. The county recorder shall record acknowledgements, including supporting documentation, and maintain an appropriate index of same."</p>		<p>underground facilities as defined in section 55-2202, Idaho Code, for ditches or canals and appurtenances, and for electric, telephone and similar lines and appurtenances.</p> <p>"(4) A highway abandoned and vacated under the provisions of this section may be reclassified as a public right-of-way.</p> <p>"(5) Until abandonment is authorized by the commissioners, public use of the highway or public right-of-way may not be restricted or impeded by encroachment or installation of any obstruction restricting public use, or by the installation of signs or notices that might tend to restrict or prohibit public use. Any person violating the provisions of this subsection shall be guilty of a misdemeanor.</p> <p>"(6) When a county or highway district desires the abandonment or vacation of any highway, public street or public right-of-way which was accepted as part of a platted subdivision said abandonment or vacation shall be accomplished pursuant to the provisions of chapter 13, title 50, Idaho Code."</p> <p>CITE: Idaho Code § 40-604.</p> <p>QUOTE:</p> <p>"40-604. DUTIES AND POWERS OF COMMISSIONERS. Commissioners shall:</p> <p>"...</p> <p>"(2) Cause to be surveyed, viewed, laid out, recorded, opened and worked, highways or public rights-of-way as are necessary for public convenience under the provisions of sections 40-202 and 40-203A, Idaho Code.</p> <p>"(3) Cause to be recorded all highways and public rights-of-way within their highway system.</p> <p>"(4) Have authority to abandon and vacate</p>	

Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>any highway or public right of way within their highway system under the provisions of section 40-203, Idaho Code."</p> <p>CITE: Idaho Code § 40-203A.</p> <p>QUOTE: "40-203A. Validation of county or highway district system highway or public right-of-way. "(1) Any resident or property holder within a county or highway district system, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may petition the board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, to initiate public proceedings to validate a highway or public right-of-way, including those which furnish public access to state and federal public lands and waters, provided that the petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings, or the commissioners may initiate validation proceedings on their own resolution, if any of the following conditions exist: "(a) If, through omission or defect, doubt exists as to the legal establishment or evidence of establishment of a highway or public right-of-way; "(b) If the location of the highway or public right-of-way cannot be accurately determined due to numerous alterations of the highway or public right-of-way, a defective survey of the highway, public right-of-way or adjacent property, or loss or destruction of the original survey of the highways or public rights-of-way; or "(c) If the highway or public right-of-way as traveled and used does not generally conform to the location of a highway or</p>	

Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>public right-of-way described on the official highway system map or in the public records.</p> <p>"(2) If proceedings for validation of a highway or public right-of-way are initiated, the commissioners shall follow the procedure set forth in section 40-203, Idaho Code, and shall:</p> <p>"(a) If the commissioners determine it is necessary, cause the highway or public right-of-way to be surveyed;</p> <p>"(b) Cause a report to be prepared, including consideration of any survey and any other information required by the commissioners;</p> <p>"(c) Establish a hearing date on the proceedings for validation;</p> <p>"(d) Cause notice of the proceedings to be provided in the same manner as for abandonment and vacation proceedings; and</p> <p>"(e) At the hearing, the commissioners shall consider all information relating to the proceedings and shall accept testimony from persons having an interest in the proposed validation.</p> <p>"(3) Upon completion of the proceedings, the commissioners shall determine whether validation of the highway or public right-of-way is in the public interest and shall enter an order validating the highway or public right-of-way as public or declaring it not to be public.</p> <p>"(4) From any such decision, any resident or property holder within a county or highway district system, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may appeal to the district court of the county in which the highway or public right-of-way is located pursuant to section 40-208, Idaho Code.</p> <p>"(5) When a board of commissioners validates a highway or public right-of-way,</p>	

Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>it shall cause the order validating the highway or public right-of-way, and if surveyed, cause the survey to be recorded in the county records and shall amend the official highway system map of the respective county or highway district.</p> <p>"(6) The commissioners shall proceed to determine and provide just compensation for the removal of any structure that, prior to creation of the highway or public right-of-way, encroached upon a highway or public right-of-way that is the subject of a validation proceeding, or if such is not practical, the commissioners may acquire property to alter the highway or public right-of-way being validated.</p> <p>"(7) This section does not apply to the validation of any highway, public street or public right-of-way which is to be accepted as part of a platted subdivision pursuant to chapter 13, title 50, Idaho Code."</p>	

Historical Statutes and Amendments				
Year = 1864	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Laws of the Territory of Idaho, at p. 578, § 1 (1864) (repealed).</p> <p>QUOTE: <u>Section 1. All roads and trails, streets and thoroughfares, shall be considered as public highways, which are, or have been used as such, at any time within the last two years prior to the passage of this act, or which may hereafter be declared as such by the board of county commissioners within their respective counties: Provided, That in case any such public highway is now closed, the same shall not be opened without an order of the board of county commissioners.</u></p> <p>NOTE: This territorial law was Idaho's first road statute. It consisted of a blanket declaration of all roads then in public use, coupled with ongoing authority for counties to create public roads by official act.</p>			

Historical Statutes and Amendments				
Year = 1875	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Compiled and Revised Laws of the Territory of Idaho, at p. 677, § 1 (1875) (repealed).</p> <p>QUOTE: "Section 1. All roads and trails, streets and thoroughfares, shall be considered as public highways, which are, or have been used as such, at any time within the last two years prior to the passage of this act, or which may hereafter be declared as such by the board of county commissioners within their respective counties: Provided, That in case any such public highway is now closed, the same shall not be opened without an order of the board of county commissioners. <u>All roads or highways laid out or now traveled in the various counties in the Territory of Idaho are hereby declared public highways; excepting such roads and highways upon which franchises have heretofore been and which franchise may now be in full force and effect.</u>"</p> <p>NOTE: This was the second blanket declaration. This statute, however, expressly excluded avoided turning toll roads into public roads.</p>			

Historical Statutes and Amendments				
Year = 1881	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Gen. Laws of Territory of Idaho, at p. 277, § 1 (1881) (repealed).</p> <p>QUOTE:</p> <p><u>"Section 1. All public highways, roads, streets, and thoroughfares, which are or have been used as such at any time within two years prior to the passage of an act entitled 'An Act concerning roads, trails, and public thoroughfares,' approved January 12th, 1875, or which may hereafter be declared such by the board of County Commissioners within their respective counties, shall be considered county roads. All roads or highways laid out or now traveled, or which have been commonly used by the public, including such as have been wrongfully closed at any time since January 12, 1873, in the several counties of this Territory, are hereby declared county roads; excepting, however, roads and highways upon which franchises have heretofore been granted, so long as the franchise of any such road shall remain in full force and effect."</u></p> <p>NOTE: This 1881 law restated the blanket declaration of 1875 and then included another blanket declaration, again excluding toll roads.</p>			

Historical Statutes and Amendments				
Year = 1885	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Gen. Laws of Territory of Idaho, at p. 162, § 1 (1885) (repealed).</p> <p>QUOTE: <u>"Section 1. All roads and highways that have been or that may hereafter be declared such by any Board of County Commissioners, and all roads and highways heretofore declared to be such by legislative enactment, and that are now open and used as such by the public, shall be considered county roads; provided, that this section shall not apply to any road heretofore established by any Board of County Commissioners, but which shall not have been opened for four years thereafter as required by law."</u></p> <p>NOTE: This 1885 statute (1) authorized road declaration by official county act, and (2) recognized the prior blanket legislative declarations. However, it excluded roads not opened within 4 years of such county declaration.</p>	<p>NOTE: The proviso at the end of the 1885 legislation declares that roads not opened after four years are no longer public roads. (See statute to left.)</p>		

Historical Statutes and Amendments				
Year = 1887	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Rev. Stat. of Idaho Terr. §§ 850, 851 (1887) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE: <u>"Section 850. Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public.</u> <u>"Sec. 851. Roads laid out and recorded as highways, by order of the Board of Commissioners, and all roads used as such for a period of five years, are highways. Whenever any corporation owning a toll bridge or a turnpike, plank or common wagon road is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</u></p> <p>NOTE: This 1887 codification replaced the earlier territorial road creation statutes and created the basic statutory format which remains in place today in sections 40-109(5) and 40-202(3). Note that as of 1887, there was no requirement for maintenance.</p> <p>The Court explained the interaction of the two sections: "It is clear . . . that § 850 defines what may constitute a highway in the State of Idaho, and that § 851 governs the procedure for the creation of a highway in the State of Idaho." <i>Galli v. Idaho County</i>, 146 Idaho 155, 160, 191 P.3d 233, 238 (2008).</p>	<p>CITE: Rev. Stat. of Idaho Terr. § 852 (1887) (later codified at Idaho Code § 40-203(4); repealed by S.B. 1106 in 1993).</p> <p>QUOTE: <u>"Sec. 852. A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."</u></p> <p>NOTE: This was Idaho's first road abandonment statute. It was substantially amended (and limited) in 1963. In 1985, all of Title 40 was repealed and this section was replaced by what is now section 40-203(4). In 1986, a formal abandonment procedure was adopted in 40-203(1). In 1993 the operative provisions of section 40-203(4) were stricken, making the formal abandonment procedures of section 40-203(1) the sole method of abandonment.</p>	<p>CITE: Rev. Stat. of Idaho Terr. § 870 (1887) (later codified at 1 Idaho Code Ann. § 1145 (1901); Idaho Code Ann. § 862 (1908); 1 Compiled Stat. § 1312 (1919); Idaho Code Ann. § 39-401 (1932); Idaho Code § 39-401 (1943); Idaho Code § 40-501 (1948); repealed and replaced by Idaho Code § 40-604(4) in 1985; cross-reference to Idaho Code § 40-203 added in 1993).</p> <p>QUOTE <u>"Section 870. The Board of County Commissioners, by proper ordinances, must:</u> <u>"2. Cause to be surveyed, viewed, laid out, recorded, opened, and worked, such highways as are necessary for public convenience, as in this chapter provided;</u> <u>"3. Cause to be recorded as highways such roads as have become such by usage or abandonment to the public;</u> <u>"4. Abolish or abandon such as are unnecessary."</u></p> <p>NOTE: This statute was recodified several times, but was unchanged until 1985, when it was repealed (along with parallel provisions in section 133(d)) and replaced with Idaho Code § 40-604(4).</p> <p>NOTE: This statute may be traced back to Gen. Laws of Territory of Idaho, at p. 162, § 17 (1885), but that earlier version of the statute did not authorize abandonment.</p>	

Historical Statutes and Amendments				
Year = 1890	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Idaho Admission Bill, 26 Stat. Sess. 1 215, ch. 656 (1890).</p> <p>NOTE: On July 3, 1890, Idaho was admitted to the Union. Idaho's Constitution was adopted in Boise City, in the Territory of Idaho, on August 6, 1889</p>			

Historical Statutes and Amendments				
Year = 1893	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: 1893 Idaho Sess. Laws at p. 12, § 1 (then codified at Rev. Stat. of Idaho Terr. § 851; codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE: "See Section 851. Roads laid out and recorded as highways, by order of the Board of Commissioners, and all roads used as such for a period of five years, provided the later shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a toll, bridge, or a turnpike, plank, or common wagon road is dissolved or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</p> <p>NOTE: The 1893 Amendment contained only a single change to the 1887 Codification. It left section 850 unchanged. The only substantive change was to add the maintenance requirement to section 851.</p> <p>NOTE: Despite numerous minor amendments, the key operative provisions of sections 850 and 851, as amended in 1893, remain nearly identical today. They are now codified (redundantly) in sections 40-109(5) and 40-202(3).</p>		<p>CITE: 1893 Idaho Sess. Laws at p. 184, § 1 (codified at Revised Statutes of Idaho § 870; later codified at 1 Idaho Code Ann. § 1145 (1901); Idaho Code Ann. § 882 (1908); 1 Compiled Stat. § 1312 (1919); Idaho Code Ann. § 39-401 (1932); Idaho Code § 39-401 (1943); Idaho Code § 40-501(1948); repealed and replaced by Idaho Code § 40-604(4) in 1985)</p> <p>QUOTE: "Section 870. The Board of County Commissioners, by proper ordinances, must: "... "2. Second. — Cause to be surveyed, viewed, laid out, recorded, opened, and worked, such highways as are necessary for public convenience, as in this chapter provided; "3. Third. — Cause to be recorded as highways such roads as have become such by usage or abandonment to the public; "4. Fourth. — Abolish or abandon such as are unnecessary."</p>	

Historical Statutes and Amendments				
Year = 1901	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Idaho Code Ann. (Political Code) §§ 1137, 1138 (1901) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE: "Section 850 <u>1137</u>. <u>What are Highways</u>. Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public. "Section 854 <u>1138</u>. <u>Further Enumeration</u>. Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the later shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a toll-bridge, or a turnpike, plank, or common wagon road is dissolved or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</p> <p>NOTE: No change in language.</p>	<p>CITE: Idaho Code Ann. (Political Code) § 1139 (1901) (later codified at Idaho Code § 40-203(4); repealed by S.B. 1108 in 1993).</p> <p>QUOTE: "See 852 Section 1139. Abandonment of Highway. A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."</p> <p>NOTE: No change in language.</p>	<p>CITE: 1901 Idaho Sess. Laws, at page 82 (codified at 1 Idaho Code Ann. § 882 (1901); 1 Compiled Stat. § 1312 (1919); Idaho Code Ann. § 39-401 (1932); Idaho Code § 39-401 (1943); Idaho Code § 40-501 (1946); repealed and replaced by Idaho Code § 40-504(4) in 1985).</p> <p>QUOTE: "Section 879 <u>1145</u>. <u>Duty of County Commissioners</u>. The Board of County Commissioners, by proper ordinances, must; ... "Second. — Cause to be surveyed, viewed, laid out, recorded, opened, and worked, such highways as are necessary for public convenience, as in this chapter provided; "Third. — Cause to be recorded as highways such roads as have become such by use <u>usage</u> or abandonment to the public; "Fourth. — Abolish or abandon such as are unnecessary;"</p> <p>NOTE: No change in language.</p>	

Historical Statutes and Amendments				
Year = 1908	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: 1 Idaho Code Ann. §§ 874, 875 (1908) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE: "Section 1437 § 874. What are Highways—Highways Defined. Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public. "Section 1438 § 875. Further Enumeration.—Recorded and Worked Highways. Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the later shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a toll-bridge, or a turnpike, plank, or common wagon road is dissolved or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</p> <p>NOTE: No change in language.</p>	<p>CITE: 1 Idaho Code Ann. § 876 (1908) (later codified at Idaho Code § 40-203(4); repealed by S.B. 1108 in 1993).</p> <p>QUOTE: "Section 1438 § 876. Abandonment of Highways: A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."</p> <p>NOTE: No change in language.</p>	<p>CITE: 1 Idaho Code Ann. § 882 (1908) (then codified at 1 Idaho Code Ann. § 882 (1901); later codified at 1 Compiled Stat. § 1312 (1919); Idaho Code Ann. § 39-401 (1932); Idaho Code § 39-401 (1943); Idaho Code § 40-501 (1948); repealed and replaced by Idaho Code § 40-604(4) in 1985).</p> <p>QUOTE: "Section 1445 § 882. Duties of County Commissioners. The board of county commissioners, by proper ordinances, must: "... "Second 2. — Cause to be surveyed, viewed, laid out, recorded, opened, and worked, such highways as are necessary for public convenience, as in this chapter provided; "Third 3. — Cause to be recorded as highways such roads as have become such by use or abandonment to the public; "Fourth 4. — Abolish or abandon such as are unnecessary;"</p> <p>NOTE: No change in language.</p>	

Historical Statutes and Amendments				
Year = 1911	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: 1911 Idaho Sess. Laws ch. 55, § 1 (the Highway District Act of 1911) (not codified).</p> <p>QUOTE: "Section 1. <u>Highways Defined.</u> <u>Highways are roads, streets, or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public.</u> "</p> <p>NOTE: This 1911 statute provided for the creation of highway districts for the first time. Its introductory provision (section 1) contained a definition of highways (quoted above) based on a slightly altered version of the language in section 1137. The language of section 1138 did not appear in this statute. In subsequent years, the code reverted to the language of sections 1137 and 1138.</p>			<p>CITE: 1911 Idaho Sess. Laws ch. 55, § 18 (codified today as amended at Idaho Code § 40-1310(5)).</p> <p>QUOTE: "Sec. 18. <u>The Highway Board shall have power to receive road petitions and lay out, alter, create and abandon public highways within their respective districts, subject to an appeal therefrom to the District Court of the judicial district in which such highway district is situated, in the same manner in which appeals are taken from the Board of County Commissioners to the District Court.</u>"</p> <p>NOTE: This 1911 statute authorized the creation of highway districts for the first time. It included general language establishing their authority, including the language above on creation and abandonment of highways.</p>

Historical Statutes and Amendments				
Year = 1919	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: 1 Compiled Stat. of Idaho §§ 1302, 1304 (1919) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE: "§ 874-1302. Highways defined: Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public. "§ 875-1304. Recorded and worked highways: Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the later shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a toll bridge, or a turnpike, plank, or common wagon road is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</p> <p>NOTE: No change in language</p>	<p>CITE: 1 Compiled Stat. of Idaho § 1305 (1919) (later codified at Idaho Code § 40-203(4); repealed by S.B. 1108 in 1993).</p> <p>QUOTE: "§ 875-1305. Abandonment of highways. A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."</p> <p>NOTE: No change in language.</p>	<p>CITE: 1 Compiled Stat. of Idaho § 1312 (1919) (later codified at Idaho Code Ann. § 39-401 (1932); Idaho Code § 39-401 (1943); Idaho Code § 40-501(1945); repealed and replaced by Idaho Code § 40-604(4) in 1985).</p> <p>QUOTE: "§ 882-1312. Duties of commissioners. The board of county commissioners, by proper ordinances, must "1. . . . "2. — Cause to be surveyed, viewed, laid out, recorded, opened and worked, such highways as are necessary for public convenience, as in this chapter provided. "3. — Cause to be recorded as highways such roads as have become such by use or abandonment to the public. "4. — Abolish or abandon such as are unnecessary."</p> <p>NOTE: No change in language.</p>	<p>CITE: 1 Compiled Stat. of Idaho § 1510 (1919) (codified today as amended at Idaho Code § 40-1310(5)).</p> <p>QUOTE: "62-18, § 1510. Powers of highway commissioners. The highway board shall have power to receive road petitions and lay out, alter, create and abandon public highways within their respective districts, subject to an appeal therefrom to the district court of the judicial district in which such highway district is situated, in the same manner in which appeals are taken from the board of county commissioners to the district court."</p> <p>NOTE: No change in language</p>

Historical Statutes and Amendments				
Year = 1921	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>CITE: S.B. 70, 1921 Idaho Sess. Laws ch. 161, § 3 (Initially codified at Compiled Statutes § 1312; later codified at Idaho Code § 39-401; codified as amended today at Idaho Code § 40-604)</p> <p>QUOTE:</p> <p>"§ <u>Section</u> 1312. The board of County Commissioners, by proper ordinances, must:</p> <p>....</p> <p>"2. Cause to be surveyed, viewed, laid out, recorded, opened and worked, such highways as are necessary for public convenience, as in this chapter provided.</p> <p>"3 Cause to be recorded as highways such roads as have become such by use or abandonment to the public.</p> <p>"4. Abolish or abandon such as are unnecessary."</p> <p>NOTE: Subsection 4 of the session law reads "necessary." This is inconsistent with all prior and subsequent statements of this provision, and is plainly an error.</p>	

Historical Statutes and Amendments				
Year = 1927	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>H.B. 147, 1927 Idaho Sess. Laws ch. 73 (then codified at section 1312 of ch. 161 of 1921 Idaho Sess. Laws; later codified at Idaho Code § 40-501; later codified at Idaho Code Ann. § 39-401 (1932); Idaho Code § 39-401 (1943); Idaho Code § 40-501(1948); repealed and replaced by Idaho Code § 40-604(4) in 1985).</p> <p>QUOTE: "Section 1312. DUTIES OF COMMISSIONERS The board of County Commissioners, by proper ordinances, must: ... "2. Cause to be surveyed, viewed, laid out, recorded, opened and worked, such highways as are necessary for public convenience, as in this chapter provided. "3. Cause to be recorded as highways such roads as have become such by use or abandonment to the public. "4. Abolish or abandon such as are unnecessary."</p> <p>NOTE: Corrected error in subsection 4.</p>	

Historical Statutes and Amendments				
Year = 1932	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: 39 Idaho Code Ann. §§ 39-101, 39-103 (1932) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE: "§ 4302—Section 39-101. — Highways defined: Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public. "§ 4304—Section 39-103. — Recorded and worked highways: Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the later shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a toll bridge, or a turnpike, plank, or common wagon road is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</p> <p>NOTE: No change in language.</p>	<p>CITE: 39 Idaho Code Ann. § 39-104 (1932) (later codified at Idaho Code §§ 40-104 and 40-203(4); repealed by S.B. 1108 in 1993).</p> <p>QUOTE: "§ 4306—Section 39-104. — Abandonment of highways. — A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."</p> <p>NOTE: No change in language.</p>	<p>CITE: 39 Idaho Code Ann. § 39-401 (1932) (later codified at Idaho Code § 39-401 (1943); Idaho Code § 40-501(1948); repealed and replaced by Idaho Code § 40-604(4) in 1985).</p> <p>QUOTE: "Section 4342—39-401. Duties of county commissioners. — The board of county commissioners, by proper ordinances, must: "1. . . . "2. Cause to be surveyed, viewed, laid out, recorded, opened and worked, such highways as are necessary for public convenience, as in this chapter provided. "3. Cause to be recorded as highways such roads as have become such by use or abandonment to the public. "4. Abolish or abandon such as are unnecessary."</p> <p>NOTE: No change in language.</p>	<p>CITE: 39 Idaho Code Ann. § 39-1524 (1932) (codified today as amended at Idaho Code § 40-1310(5)).</p> <p>QUOTE: "§ 4540. 39-1524. Powers of highway commissioners. — The highway board shall have power to receive road petitions and lay out, alter, create and abandon public highways within their respective districts, subject to an appeal therefrom to the district court of the judicial district in which such highway district is situated, in the same manner in which appeals are taken from the board of county commissioners to the district court."</p> <p>NOTE: No change in language.</p>

Historical Statutes and Amendments				
Year = 1943	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>CITE: S.B. 88, 1943 Idaho Sess. Laws ch. 88, § 1 (then codified at Idaho Code § 39-401, later codified at Idaho Code § 40-501; codified today as amended at Idaho Code § 40-604(i4)).</p> <p>QUOTE</p> <p>"Section 39-401. Duties of the county commissioners. The board of county commissioners, by proper ordinances, must</p> <p>"2. Cause to be surveyed, viewed, laid out, recorded, opened and worked, such highways as are necessary for public convenience, as in this chapter provided.</p> <p>"3. Cause to be recorded as highways such roads as have become such by use or abandonment to the public.</p> <p>"4. Abolish or abandon such as are unnecessary."</p> <p>....</p> <p><u>"12. To remove [should be 'rename'] any street or highway within the county, excepting those situated within the territorial limits of incorporated cities, towns and villages when such renaming will eradicate confusion and be in the public interest."</u></p> <p>NOTE: Section 12 granted county commissioners the right to "rename" streets and highways. The session law incorrectly stated this as a right to "remove" them. This error in the session law was corrected in the codified version. Consequently, section 12 should <u>not</u> be cited as an abandonment authority.</p>	

Historical Statutes and Amendments				
Year = 1948	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Idaho Code §§ 40-101, 40-103 (1948) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE: "Section 39 40-101 — Highways defined — Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public. "Section 39 40-103 — Recorded and worked highways: Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the later shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a toll bridge, or a turnpike, plank, or common wagon road is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</p> <p>NOTE: The Idaho Code was created in 1948. Former Title 39 was reclassified to Title 40. No change in language.</p>	<p>CITE: Idaho Code § 40-104 (1948).</p> <p>QUOTE: "Section 39 40-104 Abandonment of highways — A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."</p> <p>NOTE: No change in language.</p>	<p>CITE: Idaho Code § 40-501 (1948).</p> <p>QUOTE: "Section 39 40-501. Duties of county commissioners — The board of county commissioners, by proper ordinances, must: "... "2. Cause to be surveyed, viewed, laid out, recorded, opened and worked, such highways as are necessary for public convenience, as in this chapter provided. "3. Cause to be recorded as highways such roads as have become such by use or abandonment to the public. "4. Abolish or abandon such as are unnecessary." "... "12. To remove rename any street or highway within the county, excepting those situated within the territorial limits of incorporated cities, towns and villages when such renaming will eradicate confusion and be in the public interest."</p> <p>NOTE: No change, except to correct error in section 12.</p> <p>NOTE: This provision was replaced in 1951 with what became section 133(d) in the 1961 recodification.</p>	<p>CITE: Idaho Code § 40-1614 (1948) (codified today as amended at Idaho Code § 40-1310(5)).</p> <p>QUOTE: "Section 39 40-1614. Powers of highway commissioners. — The highway board shall have power to receive road petitions and lay out, alter, create and abandon public highways within their respective districts, subject to an appeal therefrom to the district court of the judicial district in which such highway district is situated, in the same manner in which appeals are taken from the board of county commissioners to the district court."</p> <p>NOTE: No change in language.</p>

Historical Statutes and Amendments				
Year = 1950	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: The Highway Administration Act of 1950, S.B. 62, 1950 Idaho Sess. Laws ch. 82, §§ 2 and 24 (codified today as amended at Idaho Code § 40-109(5)).</p> <p>QUOTE: "Section 2. HIGHWAYS DEFINED. — Highways are <u>hereby defined as roads, streets, or alleys, and bridges, laid out or erected by established for the public, or if laid out or erected by others, dedicated or abandoned to the public. Such highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, pedestrian facilities, and any other structures or fixtures incidental to the preservation or improvement of such highways.</u>"</p> <p>NOTE: S.B. 62 established the state highway department. Section 24 of the act repealed the definition section (section 40-101) and replaced it with the uncodified section 2 quoted above. The 1950 Act contained no provisions on road creation or passive abandonment.</p>		<p>CITE: The Highway Administration Act of 1950, S.B. 62, 1950 Idaho Sess. Laws ch. 82, §§ 13.</p> <p>QUOTE: "<u>Section 13. Removal of Roads from County Road System. — Roads may be abandoned for the purposes of this act and removed from a county road system by the board of county commissioners.</u>"</p> <p>NOTE: This provision was in effect only one year. The 1951 Act repealed the entire 1950 Act. This provision was replaced in 1951 with a requirement that any abandonment be premised on a public interest determination.</p>	

Historical Statutes and Amendments				
Year = 1951	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: The Highway Administration Act of 1951, S.B. 125, 1951 Idaho Sess. Laws ch. 93, § 2 (codified today as amended at Idaho Code § 40-109(5)).</p> <p>QUOTE: "Section 2. HIGHWAYS DEFINED. — Highways are hereby defined as roads, streets, alleys and bridges, laid out or established for the public or dedicated or abandoned to the public. Such highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, pedestrian facilities, and any other structures, <u>works</u> or fixtures incidental to the preservation or improvement of such highways."</p> <p>NOTE: The 1951 Act largely repealed what the 1950 Act did. Again, it repealed the definition section (section 40-101) and replaced it with the uncodified section 2 quoted above. The 1951 Act also contained no provisions on road creation or passive abandonment.</p>		<p>CITE: The Highway Administration Act of 1951, S.B. 125, 1951 Idaho Sess. Laws ch. 93, § 28 (codified in 1951 at Idaho Code § 40-133(d)) (repealed in 1985, along with Idaho Code § 40-501, and replaced by Idaho Code § 40-604(4)).</p> <p>QUOTE: "<u>Section 28. DUTIES AND POWERS OF BOARD OF COUNTY COMMISSIONERS. — The Board of County Commissioners shall:</u> "<u>(d) Have authority to abandon any road and remove it from the county highway system, when such action is determined by the Board of County Commissioners to be in the public interest.</u>"</p> <p>NOTE: The 1951 Act restated the authority of county commissioners to abandon roads as provided in the 1950 Act, expressly adding a requirement for a determination that the action be in the public interest.</p> <p>NOTE: The separate (and largely redundant) statement of authority in section 40-501 remained on the books until 1985, when both provisions were replaced with section 40-604(4).</p>	

Historical Statutes and Amendments				
Year = 1961	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Idaho Code §§ 40-101, 40-103, 40-107 (1961) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE: "Section 40-101." [Repealed.]</p> <p>"Section 40-103. Recorded and worked highways. — Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the later shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a toll bridge, or a turnpike, plank, or common wagon road is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</p> <p>"Section 40-107. Highways defined. — Highways are hereby defined as roads, streets, alleys and bridges, laid out or established for the public or dedicated or abandoned to the public. Such highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, pedestrian facilities, and any other structures, works or fixtures incidental to the preservation or improvement of such highways."</p> <p>NOTE: This is the re-codification implements the 1950 and 1951 Acts by replacing section 40-101 with 40-107. Section 103 was unchanged.</p>		<p>CITE: Idaho Code § 40-133(d) (1961).</p> <p>QUOTE: "40-133. Duties And Powers of Board of County Commissioners. — The Board of County Commissioners shall: ... (d) Have authority to abandon any road and remove it from the county highway system, when such action is determined by the board of county commissioners to be in the public interest."</p> <p>NOTE: Codified 1951 Act without change at section 40-133(d). Section 40-133(d) was repealed and replaced by section 40-604(4) in the 1985 revision of Title 40.</p>	

Historical Statutes and Amendments				
Year = 1963	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
		<p>CITE: H.B. 15, 1963 Idaho Sess. Laws ch. 6, § 1 (then codified at Idaho Code § 40-104; later codified at Idaho Code § 40-203(4); repealed by S.B. 1108 in 1993).</p> <p>QUOTE: "40-104. ABANDONMENT OF HIGHWAYS. — A road <u>established by prescription</u> not worked or used for the period of five (5) years ceases to be a highway for any purpose whatever. —"</p> <p>NOTE: S.B. 15 expressly stated that the passive road abandonment statute applied only to roads originally created by prescription. Prescription, presumably, refers to roads created by use (Methods 2 and 3) under the Road Creation Statute.</p> <p>NOTE: In <i>Taggart v. Highway Board for the North Latah County Highway Dist.</i>, 115 Idaho 516, 771 P.2d 37 (1989), the limitation to prescriptive roads was applied to a pre-1963 abandonment, suggesting that the 1963 statute merely codified prior law.</p> <hr/> <p>CITE: S.B. 242, 1963 Idaho Sess. Laws ch. 267, § 1 (then codified at Idaho Code § 40-104; later codified at Idaho Code § 40-203(4); repealed by S.B. 1108 in 1993).</p> <p>QUOTE: "40-104. ABANDONMENT OF HIGHWAYS. — A road <u>established by prescription</u> not worked or used for the period of five years ceases to be a highway for any purpose whatever; <u>provided, however, that in the case of roads furnishing public access to public lands, state or federal, and/or public waters, no person may encroach</u></p>		<p>CITE: S.B. 243, 1963 Idaho Sess. Laws ch. 218, § 1 (then codified at Idaho Code § 40-1614, codified today as amended at Idaho Code § 40-1310(5)).</p> <p>QUOTE: "40-1614. POWERS OF HIGHWAY COMMISSIONERS. — The highway board shall have power to receive road petitions and lay out, alter, create and abandon public highways within their respective districts, subject to an appeal therefrom to the district court of the judicial district in which such highway district is situated, in the same manner in which appeals are taken from the board of county commissioners to the district court; <u>provided, however, that where highways furnish public access to public lands, state or federal, and/or public waters, before the same may be abandoned the highway board must first be in receipt of a petition for abandonment and that no abandonment shall be made without conducting a public hearing thereon, notice of which hearing shall be published at least once a week for four (4) successive weeks in some newspaper of general circulation in a county in which the highway district is wholly or partially located, at which hearing any person may appear and show cause for or against abandonment. If it appears at such hearing that the highway does serve a public use, said highway may not be abandoned without first providing other suitable public access route or routes to said public lands and/or public waters at the expense of the party petitioning for abandonment of the highway.</u>"</p> <p>NOTE: S.B. 243, the companion bill to S.B. 242, applied to roads governed by highway districts. It also established formal procedures for abandonment where access to public lands is involved. This</p>

Historical Statutes and Amendments				
Year = 1963	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
		<p><u>upon the same and thereby restrict public use without first petitioning for the abandonment of the road to the county commissioners of the county in which the road is located or if the road be located in a highway district then to the board of commissioners of the highway district in which the same is located, and until such time as abandonment is authorized by the commissioners having jurisdiction thereof, public use of the roadway may not be restricted or impeded by encroachment or installation of any obstruction restricting public use or by the installation of signs or notices that might tend to restrict or prohibit public use."</u></p> <p>NOTE: S.B. 242 repeated the limitation to prescription contained in H.B. 15. More significantly, it added formal procedures for abandonment when access to public lands is involved. Note that S.B. 243 did the same thing for highway districts</p> <p>NOTE: These public access provisions were repealed in 1993 (S.B. 1108) because they were redundant with the formal abandonment provisions in section 40-203(1) (adopted in 1986, H.B. 556).</p> <p>NOTE: This item is listed under the "passive" abandonment column, because it amends the passive abandonment statute. However, S.B. 242 added formal abandonment requirements to the passive abandonment statute.</p>		<p>section was repealed in 1985 when all of Title 40 was re-written, and section 1614 became section 1310(5), dropping the special provisions for public access roads. In 1986, however, the Legislature enacted new formal abandonment provisions at section 40-203. In 1993, section 40-1310(5) was amended to state that section 40-203 procedures are mandatory for highway districts.</p>

Historical Statutes and Amendments				
Year = 1985	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: H.B. 265, 1985 Idaho Sess. Laws ch. 253, § 2 (codified at Idaho Code §§ 40-109(5), 40-202; codified today as amended at Idaho Code §§ 40-109(5), 40-202(3)).</p> <p>QUOTE: "40-107. Highways defined 40-109. DEFINITIONS - - H. "(5) 'Highways' mean roads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public. Highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, adjacent lands or interests lawfully acquired, pedestrian facilities, and any other structures, works or fixtures incidental to the preservation or improvement of the highways. Roads laid out and recorded as highways by order of a board of commissioners, and all roads used as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways. Whenever any corporation owning a road or a bridge is dissolved, or discontinues the road or bridge, the bridge or road becomes a highway." "40-109- 40-202. RECORDED AND WORKED HIGHWAYS. Roads laid out and recorded as highways, by order of the a board of commissioners, and all roads used as such highways for a period of five (5) years, provided the latter they shall have been worked and kept up at the expense of the public, or located and recorded by order of a the board of commissioners, are highways. Whenever </p>	<p>CITE: H.B. 265, 1985 Idaho Sess. Laws ch. 253, § 2 (codified at Idaho Code § 40-203; repealed by S.B. 1108 in 1993).</p> <p>QUOTE: "40-104-40-203. ABANDONMENT OF HIGHWAYS. — A road established by prescription not worked or used for the a period of five (5) years ceases to be a highway for any purpose whatever. ; provided, however, that in the case of roads furnishing public access to public lands, state or federal public lands or waters, and/or public waters, no person may encroach upon the same and thereby restrict public use without first petitioning for the abandonment of the road to the county commissioners of the county or highway district in which the road is located, or if the road be located in a highway district then to the board of commissioners of the highway district in which the same is located, and until such time as abandonment is authorized by the commissioners having jurisdiction thereof, public use of the roadway may not be restricted or impeded by encroachment or installation of any obstruction restricting public use or by the installation of signs or notices that might tend to restrict or prohibit public use." <p>NOTE: Recodified section 40-104 to section 40-203. Changes in language were cosmetic.</p> </p>	<p>CITE: H.B. 265, 1985 Idaho Sess. Laws ch. 253, § 2 (codified at Idaho Code § 40-604)</p> <p>QUOTE: "40-604. DUTIES AND POWERS OF COMMISSIONERS. Commissioners shall, "(2) Cause to be surveyed, viewed, laid out, recorded, opened and worked, any highways as are necessary for public convenience, "(3) Cause to be recorded as highways those that have become such by use or abandonment, "(4) Have authority to abandon any highway and remove it from the county highway system when that action is determined to be in the public interest." <p>NOTE: H.B. 265 repealed section 40-501 and 40-133(d), replacing them with section 40-604 which contained language from each.</p> </p>	<p>CITE: H.B. 265, 1985 Idaho Sess. Laws ch. 253, § 2 (codified as amended at Idaho Code § 40-1310(5)).</p> <p>QUOTE: "40-1644 40-1310. POWERS AND DUTIES OF HIGHWAY DISTRICT COMMISSIONERS. "(5) The highway board shall have district has the power to receive road petitions and lay out, alter, create and abandon public highways within their respective districts, subject to an appeal therefrom to the district court of the judicial district in which each the highway district is situated. In the same manner in which appeals are taken from the board of county commissioners to the district court—provided—however—that where highways furnish public access to public lands, state or federal, and/or public waters, before the same may be abandoned the highway board must first be in receipt of a petition for abandonment and that no abandonment shall be made without conducting a public hearing thereon, notice of which hearing shall be published at least once a week for four (4) successive weeks in some newspaper of general circulation in a county in which the highway district is wholly or partially located, at which hearing any person may appear and show cause for or against abandonment. If it appears at such hearing that the highway does serve a public use, said highway may not be abandoned without first providing other suitable public access route or routes to said public lands and/or public waters at the expense of the party petitioning for abandonment of the highway." <p>NOTE: The special provisions for public access road abandonment procedures were not included in the 1985</p> </p>

Historical Statutes and Amendments				
Year = 1985	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>any corporation owning a toll bridge, or a turnpike, plank, or common wagon road or a bridge, is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</p> <p>NOTE: H.B. 265 repealed all of Title 40, replacing it with a new title. Note that the definition reiterates the provisions of section 40-202.</p>			<p>recodification. However, they were replaced in the following year by the abandonment procedures applicable to all roads set out in Idaho Code § 40-203(1).</p>

Historical Statutes and Amendments				
Year = 1986	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: H.B. 556, 1986 Idaho Sess. Laws ch. 206, § 2 (codified as amended at Idaho Code § 40-202(3)) (codified today as amended at Idaho Code § 40-202(3)).</p> <p>QUOTE: "40-202 RECORDED AND WORKED <u>DESIGNATION OF HIGHWAYS.</u> " "<u>(3) Roads Highways</u> laid out and recorded as highways, by order of a board of commissioners, and all roads used as highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a road or bridge highway is dissolved, or discontinues the road or bridge highway, the road or bridge highway may become a public highway. <u>If a highway created in accordance with the provisions of this subsection is not designated on the official map of the respective highway system, there shall be no duty to maintain that highway nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs, until the highway is designated as part of the county or highway district system by inclusion on the official map.</u>"</p> <p>NOTE: H.B. 556 expanded former section 40-202. The old "creation" section became subsection 40-202(3). New language at the end of section 40-202(3) clarified there is no duty to maintain highways not on the official map. H.B. 556 did not amend the definition section (section 40-109(5)).</p>	<p>CITE: H.B. 556, 1986 Idaho Sess. Laws ch. 206, § 3 (codified at Idaho Code § 40-203(4)) (repealed by S.B. 1108 in 1993).</p> <p>QUOTE: "40-203 <u>ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM HIGHWAYS.</u> " "<u>(4) A road highway</u> established by prescription not worked or used for a period of five (5) years ceases to be a highway for any purpose whatever, <u>unless the highway is designated as part of a county or highway district system by inclusion on the official map.</u> In the case of roads highways furnishing public access to state or federal public lands or waters, no person may encroach upon them and restrict public use without first petitioning for the abandonment of the road highway to the appropriate commissioners of the county or highway district in which the road highway is located. Until abandonment is authorized by the commissioners having jurisdiction, public use of the roadway highway may not be restricted or impeded by encroachment or installation of any obstruction restricting public use, or by the installation of signs or notices that might tend to restrict or prohibit public use."</p> <p>NOTE: While creating new formal abandonment requirements in subsection 40-203(1) (see note in column to right), H.B. 556 retained the passive road abandonment provision, which became subsection 40-203(4). However, this section (which in 1963 was limited to roads created by prescription which did not access public lands) was further</p>	<p>CITE: H.B. 556, 1986 Idaho Sess. Laws ch. 206, § 3 (codified at Idaho Code § 40-203(1)).</p> <p>QUOTE: "40-203. <u>ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM HIGHWAYS.</u> " "<u>(1) A board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, shall use the following procedure to withdraw public highway status from any highway in the county or highway district system:</u> "<u>(a) The commissioners may by resolution declare its intention to abandon and vacate any highway considered no longer to be in the public interest.</u> "<u>(b) Any resident within a county or highway district system may petition the respective commissioners for abandonment and vacation. The petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings.</u> "<u>(c) The commissioners shall establish a hearing date on the proposed abandonment and vacation.</u> "<u>(d) The commissioners shall prepare a report stating the effects of the proposed abandonment and vacation on the public interest.</u> "<u>(e) The commissioners shall publish notice of the hearing in accordance with the provisions of section 40-206, Idaho Code, and shall mail notice to owners of land abutting the portion of the highway proposed to be abandoned and vacated at their addresses as shown on the county assessor's tax rolls at least fifteen (15) days prior to the date of the hearing.</u> "<u>(f) At the hearing, the commissioners shall review the report prepared under this section and shall accept testimony from</u></p>	

Historical Statutes and Amendments				
Year = 1986	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
		<p>limited by making it inapplicable to roads designated on the official highway map. The special abandonment proceedings required for roads accessing public lands were also retained.</p> <p>CITE: H.B. 647, 1986 Idaho Sess. Laws ch. 328, § 4 (codified at Idaho Code § 40-203) (repealed by S.B. 1108 in 1993).</p> <p>QUOTE: "40-203. ABANDONMENT OF HIGHWAYS. A roadhighway established by prescription not worked or used for a period of five (5) years ceases to be a highway for any purpose whatever. In the case of roadshighways furnishing public access to state or federal public lands or waters, no person may encroach upon them and restrict public use without first petitioning for the abandonment of the roadhighway to the appropriate commissioners of the county or highway district in which the roadhighway is located. Until abandonment is authorized by the commissioners having jurisdiction, public use of the roadhighway may not be restricted or impeded by encroachment or installation of any obstruction restricting public use or by the installation of signs or notices that might tend to restrict or prohibit public use."</p> <p>NOTE: H.B. 647 and H.B. 556 were both enacted in 1986. H.B. 647 dealt mostly with other parts of the highway code. It also changed all references from "road" to "highway" in section 40-203 (which became section 40-203(4) in the other bill). So far as section 40-203 is concerned, H.B. 647 was superseded by H.B. 556.</p>	<p>persons having an interest in the proceeding.</p> <p><u>"(g) After completion of the procedures, the commissioners may retain the highway as such or may by order or resolution declare the highway status withdrawn from all or part of the portion of the highway under consideration.</u></p> <p><u>"(h) The commissioners shall cause any order or resolution to be recorded in the county records and the official map of the highway system to be amended as affected by the abandonment and vacation."</u></p> <p>NOTE: H.B. 556 also amended the passive abandonment statute (see discussion in column to the left).</p> <p>CITE: H.B. 556, § 4, 1986 Idaho Sess. Laws ch. 206 (codified at Idaho Code § 40-203A)</p> <p>QUOTE: <u>"40-203A. VALIDATION OF COUNTY OR HIGHWAY DISTRICT SYSTEM HIGHWAY OR PUBLIC RIGHT-OF-WAY.</u> <u>"(1) Any resident or property holder within a county or highway district system, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may petition the board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, to initiate public proceedings to validate a highway or public right-of-way, including those which furnish public access to state and federal public lands and waters, provided that the petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings, or the commissioners may initiate validation proceedings on their own resolution if any of the following conditions exist:</u> <u>"(a) If, through omission or defect, doubt</u></p>	

Historical Statutes and Amendments				
Year = 1986	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p><u>exists as to the legal establishment or evidence of establishment of a highway or public right-of-way.</u></p> <p><u>"(b) If the location of the highway or public right-of-way cannot be accurately determined due to numerous alterations of the highway or public right-of-way, a defective survey of the highway, public right-of-way or adjacent property, or loss or destruction of the original survey of the highways or public rights-of-way, or</u></p> <p><u>"(c) If the highway or public right-of-way as traveled and used does not generally conform to the location of a highway or public right-of-way described on the official highway system map or in the public records.</u></p> <p><u>"(2) If proceedings for validation of a highway or public right-of-way are initiated, the commissioners shall follow the procedure set forth in section 40-203, Idaho Code, and shall:</u></p> <p><u>"(6) ... commissioners may acquire property to alter the highway or public right-of-way being validated.</u></p> <p><u>"(7) This section does not apply to the validation of any highway, public street or public right-of-way which is to be accepted as part of a platted subdivision pursuant to chapter 13, title 50, Idaho Code."</u></p>	

Historical Statutes and Amendments				
Year = 1988	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: H.B. 578, 1988 Idaho Sess. Laws ch. 184, § 2 (codified as amended at Idaho Code § 202(3)).</p> <p>QUOTE:</p> <p>"40-109. DEFINITIONS - - H.</p> <p>... (5) 'Highways' mean roads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public. Highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, adjacent lands or interests lawfully acquired, pedestrian facilities, and any other structures, works or fixtures incidental to the preservation or improvement of the highways. Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways. Whenever any corporation owning a road or a bridge is dissolved, or discontinues the road or bridge, the bridge or road becomes a highway.</p> <p>"40-202. DESIGNATION OF HIGHWAYS.</p> <p>... (3) Highways laid out and recorded, by order of a board of commissioners, and all highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a highway is dissolved, or discontinues the highway, the highway</p>			

Historical Statutes and Amendments				
Year = 1988	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>may become a public highway.—If a highway created in accordance with the provisions of this subsection is not designated on the official map of the respective highway system, there shall be no duty to maintain that highway, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs, until the highway is designated as part of the county or highway district system by inclusion on the official map.</p> <p>NOTE: The 1988 Amendments deleted obsolete provisions dealing with former toll roads.</p>			

Historical Statutes and Amendments				
Year = 1992	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: H.B. 627, 1992 Idaho Sess. Laws ch. 55, § 1 (codified as amended at Idaho Code § 202(3)).</p> <p>QUOTE: "40-202. DESIGNATION OF HIGHWAYS. " . . . "(3) Highways laid out and recorded and opened as described in subsection (2) of this section, by order of a board of commissioners, and all highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of the board of commissioners, are highways. If a highway created in accordance with the provisions of this subsection is not designated on the official map of the respective highway system or is not opened as described in subsection (2) of this section, there shall be no duty to maintain that highway, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs, until the highway is designated as part of the county or highway district system by inclusion on the official map and opened to public travel."</p> <p>NOTE: Added language to address roads which have been "opened" to the public. Presumably, roads not yet opened are not subject to abandonment.</p>	<p>CITE: H.B. 872, 1992 Idaho Sess. Laws ch. 323, § 1 (codified at Idaho Code § 40-203(4)).</p> <p>NOTE: The informal abandonment provision (section 40-203(4)) was unchanged</p>	<p>CITE: H.B. 872, 1992 Idaho Sess. Laws ch. 323, § 1 (codified at Idaho Code § 40-203(1)).</p> <p>QUOTE: "40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM HIGHWAYS. "(1) A board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, shall use the following procedure to withdraw public highway status from any highway in the county or highway district system: "(a) The commissioners may by resolution declare its intention to abandon and vacate any highway considered no longer to be in the public interest. "(b) Any resident within a county or highway district system may petition the respective commissioners for abandonment and vacation. The petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings. "(c) The commissioners shall establish a hearing date on the proposed abandonment and vacation. "(d) The commissioners shall prepare a report stating the effects of the proposed abandonment and vacation on the public interest. "(e) The commissioners shall publish notice of the hearing in accordance with the provisions of section 40-206, Idaho Code, and shall mail notice to owners of land abutting the portion of the highway proposed to be abandoned and vacated at their addresses as shown on the county assessor's tax rolls at least fifteen (15) days prior to the date of the hearing. "(f) At the hearing, the commissioners shall review the report prepared under this</p>	

Historical Statutes and Amendments				
Year = 1992	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>section and shall accept testimony from persons having an interest in the proceeding.</p> <p>"(g) After completion of the procedures, the commissioners may retain the highway as such or may by order or resolution declare the highway status withdrawn from all or part of the portion of the highway under consideration.</p> <p><u>"(h) If the commissioners determine that a highway parcel to be abandoned and vacated in accordance with the provisions of this section has a fair market value of twenty-five hundred dollars (\$2,500) or more, a charge may be imposed upon the acquiring party not in excess of the fair market value of the parcel, as a condition of the abandonment and vacation; provided, however, no such charge shall be imposed on the landowner who originally dedicated such parcel to the public for use as a highway.</u></p> <p>"(i) The commissioners shall cause any order or resolution to be recorded in the county records and the official map of the highway system to be amended as affected by the abandonment and vacation."</p> <p>NOTE: Added new section 40-203(1);h) to the formal abandonment and vacation section providing that when a road worth more than \$2,500 is abandoned, the acquiring entity may be charged the market value as a condition of the abandonment and vacation</p>	

Historical Statutes and Amendments				
Year = 1993	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: S.B. 1108, 1993 Idaho Sess. Laws ch. 412, § 1 (codified at Idaho Code § 40-106(3)).</p> <p>QUOTE: "40-106. DEFINITIONS – E "..." "(3) 'Expense of the public' means the expenditure of funds for roadway maintenance by any governmental agency, including funds expended by any agency of the federal government, so long as the agency allows public access over the roadway on which the funds were expended and such roadway is not located on federal or state-owned land."</p> <p>"40-202. DESIGNATION OF HIGHWAYS AND PUBLIC RIGHTS OF WAY. "..." "(3) Highways laid out, recorded and opened as described in subsection (2) of this section, by order of a board of commissioners, and all highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of the board of commissioners, are highways. If a highway created in accordance with the provisions of this subsection is not designated on the official map of the respective highway system or is not opened as described in subsection (2) of this section, there shall be no duty to maintain that highway, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs, until the highway is designated as part of the county or highway district system by inclusion on the official map as a highway and opened to public travel as a highway."</p> <p>NOTE: S.B. 1108 added a new definition</p>	<p>CITE: S.B. 1108, 1993 Idaho Sess. Laws ch. 412, § 4 (codified at Idaho Code § 40-203(4)).</p> <p>QUOTE: "40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM OR PUBLIC RIGHTS OF WAY. "..." "(4) A highway established by prescription not worked or used for a period of five (5) years ceases to be a highway for any purpose whatsoever, unless the highway is designated as part of a county or highway district system by inclusion on the official map. In the case of highways furnishing public access to state or federal public lands or waters, no person may encroach upon them and restrict public use without first petitioning for the abandonment of the highway to the appropriate commissioners of the county or highway district in which the highway is located abandoned and vacated under the provisions of this section may be reclassified as a public right of way</p> <p>NOTE: The above amendment had the effect of repealing the passive road abandonment procedure</p> <p>CITE: S.B. 1108, 1993 Idaho Sess. Laws ch. 412, § 4 (codified at Idaho Code § 40-203(5)).</p> <p>QUOTE: "(5) Until abandonment is authorized by the commissioners having jurisdiction, public use of the highway or the public right of way may not be restricted or impeded by encroachment or installation of any obstruction restricting public use or by the installation of signs or notices that might tend to restrict or prohibit public use. Any person violating the provisions</p>	<p>CITE: S.B. 1108, 1993 Idaho Sess. Laws ch. 412, § 4 (codified at Idaho Code § 40-203(1)).</p> <p>QUOTE: "40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM HIGHWAYS OR PUBLIC RIGHTS OF WAY. "(1) A board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, shall use the following procedure to withdraw public-highway status from abandon and vacate any highway or public right of way in the county or highway district system including those which furnish public access to state and federal public lands and waters: "(a) The commissioners may by resolution declare its intention to abandon and vacate any highway considered no longer to be in the public interest. "(b) Any resident, or property holder, within a county or highway district system including the state of Idaho, any of its subdivisions, or any agency of the federal government may petition the respective commissioners for abandonment and vacation of any highway or public right of way within the highway system. The petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings. "(c) The commissioners shall establish a hearing date or dates on the proposed abandonment and vacation. "(d) The commissioners shall prepare a report public notice stating the effects of their intention to hold a public hearing to consider the proposed abandonment and vacation on the public interest of a highway or public right of way which shall be made available to the public not later than thirty (30) days prior to any hearing and mailed to any person requesting a copy more than</p>	<p>CITE: S.B. 1108, 1993 Idaho Sess. Laws ch. 412, § 7 (codified at Idaho Code § 40-1310(5)).</p> <p>QUOTE: "40-1310. POWERS AND DUTIES OF HIGHWAY DISTRICT COMMISSIONERS. "..." "(5) The highway district has the power to receive road highway petitions and lay out, alter, create and abandon and vacate public highways and rights of way within their respective districts, subject to an appeal to the district court of the judicial district in which the highway district is situated, in the same manner in which appeals are taken from the county commissioners to the district court under the provisions of sections 40-202, 40-203 and 40-203A, Idaho Code."</p> <p>NOTE: S.B. 1108 also closed the loop for highway districts by expressly providing that their authority to abandon under section 40-1310(5) must be exercised pursuant to the procedures spelled out in section 40-203</p>

Historical Statutes and Amendments				
Year = 1993	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>of "expense of the public" to clarify that federal expenditures count as public expenditures in the creation of prescriptive roads (reversing result in <i>French v. Sorenson</i> (1988)). (In contrast, note that the abandonment statute only requires that a road be "worked" to avoid abandonment; it does not state that the work must be at the expense of the public.)</p> <p>NOTE: S.B. 1108 added "<u>as a highway</u>" to the provision at end of section 40-202(3).</p>	<p><u>of this subsection shall be guilty of a misdemeanor."</u></p> <p>NOTE: S.B. 1108 also criminalized violations.</p> <p>CITE: S.B. 1108, 1993 Idaho Sess. Laws ch. 412, § 4 (codified at Idaho Code § 40-203(6)).</p> <p>QUOTE: <u>"(6) This section does not apply to the abandonment or vacation of any highway, public street or public right of way which was accepted as part of a platted subdivision pursuant to chapter 13, title 50, Idaho Code."</u></p> <p>NOTE: It also stated that platted streets not subject to abandonment procedures.</p>	<p>three (3) working days after any such request.</p> <p><u>"(e) At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway, [The commissioners shall publish notice of the hearing in accordance with the provisions of section 40-206, Idaho Code, and shall mail notice to owners of land abutting the portion of the highway or right of way proposed to be abandoned and vacated at their addresses as shown on the county assessor's tax rolls at least fifteen (15) days prior to the date of the hearing and shall publish notice of the hearing at least two (2) times if in a weekly newspaper or three (3) times if in a daily newspaper, the last notice to be published at least five (5) days and not more than twenty-one (21) days before the hearing.</u></p>	
	<p>CITE: H.B. 388, 1993 Idaho Sess. Laws ch. 142 (codified as amended at Idaho Code §§ 40-107(5), 40-204A).</p> <p>NOTE: The full text of section 204A, as amended, is set out above under the heading "Statutes as they read today."</p> <p>NOTE: H.B. 388 added a new definition for "federal land rights of way" at section 40-107(5) which defines them in terms of the federal statute R.S. 2477. The bill also added a new section 204A dealing with R.S. 2477 rights-of-way. Among other important provisions, section 40-204A(1) recognizes that "construction and first use" are sufficient to accept R.S. 2477 rights-of-way. Section 40-204A(2) states that abandonment principles do not apply to R.S. 2477 rights-of-way.</p>		<p><u>"(f) At the hearing, the commissioners shall review the report prepared under this section and shall accept testimony from persons having an interest in the proceeding accept all information relating to the proceedings. Any person, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may appear and give testimony for or against abandonment.</u></p> <p><u>"(g) After completion of the procedures proceedings and consideration of all related information, the commissioners may retain the highway as such or may by order or resolution declare the highway status withdrawn from all or part of the portion of the highway under consideration shall decide whether the abandonment and vacation of the highway is in the public interest. The decision whether or not to abandon and vacate the highway or public right of way shall be written and shall be supported by findings of fact and conclusions of law.</u></p> <p><u>"(h) If the commissioners determine that</u></p>	

Historical Statutes and Amendments				
Year = 1993	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>a highway or <u>public right of way</u> parcel to be abandoned and vacated in accordance with the provisions of this section has a fair market value of twenty-five hundred dollars (\$2,500) or more, a charge may be imposed upon the acquiring entity, not in excess of the fair market value of the parcel, as a condition of the abandonment and vacation; provided, however, no such charge shall be imposed on the landowner who originally dedicated such parcel to the public for use as a highway <u>or public right of way</u>.</p> <p>"(i) The commissioners shall cause any order or resolution to be recorded in the county records and the official map of the highway system to be amended as affected by the abandonment and vacation.</p> <p>"(ii) <u>From any such decision, a resident or property holder within the county or highway district system, including the state of Idaho or any of its subdivisions or any agency of the federal government, may appeal to the district court of the county in which the highway or public right of way is located pursuant to section 40-208, Idaho Code.</u></p> <p>NOTE: S.B. 1108 provided extensive amendments to the formal abandonment procedures</p> <p>CITE: S.B. 1108, 1993 Idaho Sess. Laws ch. 412, § 6 (codified at Idaho Code § 40-208).</p> <p>QUOTE: "40-208. JUDICIAL REVIEW. "(1) <u>Any resident or property holder within the county or highway district system, including the state of Idaho or any of its subdivisions, or any agency of the federal government, who is aggrieved by a final decision of a board of county or highway district commissioners in an abandonment and vacation or validation proceeding is</u></p>	

Historical Statutes and Amendments				
Year = 1993	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p><u>entitled to judicial review under the provisions of this section.</u></p> <p><u>"(2) Proceedings for review are instituted by filing a petition in the district court of the county in which the commissioners have jurisdiction over the highway or public right of way within twenty-eight (28) days after the filing of the final decision of the commissioners or, if a rehearing is requested, within twenty-eight (28) days after the decision thereon.</u></p> <p><u>"(3) The filing of the petition does not itself stay enforcement of the commissioners' decision. The reviewing court may order a stay upon appropriate terms.</u></p> <p><u>"(4) Within thirty (30) days after the service of the petition, or within further time allowed by the court, the commissioners shall transmit to the reviewing court the original, or a certified copy, of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be ordered by the court to pay for additional costs. The court may require subsequent corrections to the record and may also require or permit additions to the record.</u></p> <p><u>"(5) If, before the date set for hearing, application is made to the court for leave to present additional information, and it is shown to the satisfaction of the court that the additional information is material and that there were good reasons for failure to present it in the proceeding before the commissioners, the court may order that the additional information shall be presented to the commissioners upon conditions determined by the court. The commissioners may modify their findings and decisions by reason of the additional information and shall file that information and any modifications, new findings, or decisions with the reviewing court.</u></p> <p><u>"(6) The review shall be conducted by the</u></p>	

Historical Statutes and Amendments				
Year = 1993	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p><u>court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the commissioners, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.</u></p> <p><u>"(7) The court shall not substitute its judgment for that of the commissioners as to the weight of the information on questions of fact. The court may affirm the decision of the commissioners or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the commissioners' findings, inferences, conclusions or decisions are:</u></p> <p><u>"(a) In violation of constitutional or statutory provisions;</u></p> <p><u>"(b) In excess of the statutory authority of the commissioners;</u></p> <p><u>"(c) Made upon unlawful procedure;</u></p> <p><u>"(d) Affected by other error of law;</u></p> <p><u>"(e) Clearly erroneous in view of the reliable, probative and substantial information on the whole record; or</u></p> <p><u>"(f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."</u></p> <p>NOTE: S.B. 1108 also added a new provision on judicial review. This provision was construed in <i>Floyd v. Board of Commts of Bonneville County ("Floyd II")</i>, 137 Idaho 718, 52 P.3d 863 (2002).</p> <hr/> <p>CITE: S.B. 1108, 1993 Idaho Sess. Laws ch. 412, § 7 (codified at Idaho Code § 40-604).</p> <p>QUOTE: "40-604. DUTIES AND POWERS OF COMMISSIONERS. Commissioners shall: "...</p>	

Historical Statutes and Amendments				
Year = 1993	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>"(2) Cause to be surveyed, viewed, laid out, recorded, opened and worked, highways or public rights of way as are necessary for public convenience <u>under the provisions of sections 40-202 and 40-203A, Idaho Code.</u></p> <p>"(3) Cause to be recorded as <u>all</u> highways those that have become such by use or abandonment and public rights of way <u>within their highway system.</u></p> <p>"(4) Have authority to abandon <u>and vacate</u> any highway and remove it from the county highway system when that action is determined to be in the public interest or public right of way within their highway system under the provisions of section 40-203, Idaho Code."</p> <p>NOTE: S.B. 1108 closed the loop by expressly providing that a county commission's authority to abandon under section 40-604(4) must be exercised pursuant to the procedures spelled out in section 40-203.</p>	

Historical Statutes and Amendments				
Year = 1994	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
				<p>CITE: H.B. 809, 1994 Idaho Sess. Laws ch. 324 § 4 (codified at Idaho Code § 40-1310(5)).</p> <p>QUOTE:</p> <p>"40-1310. POWERS AND DUTIES OF HIGHWAY DISTRICT COMMISSIONERS.</p> <p>"(5) The highway district has the power to receive highway petitions and lay out, alter, create and abandon and vacate public highways and public rights-of-way within their respective districts under the provisions of sections 40-202, 40-203 and 40-203A, Idaho Code. <u>Provided however, when a public highway, public street and/or public right-of-way is part of a platted subdivision which lies within an established county/city impact area or within one (1) mile of a city if a county/city impact area has not been established, consent of the city council of the affected city, when the city has a functioning street department with jurisdiction over city streets, shall be necessary prior to the granting of acceptance or vacation of said public street or public right-of-way by the highway district board of commissioners.</u></p> <p>NOTE: H.B. 809 provided that highway districts must obtain the consent of city councils before accepting or vacating roads within platted subdivisions.</p>

Historical Statutes and Amendments				
Year = 1995	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: S.B. 1117, 1995 Idaho Sess. Laws ch. 121 § 1 (codified at Idaho Code § 40-202).</p> <p>NOTE: Added hyphens to "right-of-way"</p>	<p>CITE: S.B. 1117, 1995 Idaho Sess. Laws ch. 121 § 2 (codified at Idaho Code § 40-203(4)).</p> <p>QUOTE: "40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM OR PUBLIC RIGHTS OF WAY. " "(4) A highway abandoned and vacated under the provisions of this section may be reclassified as a public right-of-way."</p> <p>NOTE: Added hyphens to "right-of-way" and other technical changes</p>	<p>CITE: S.B. 1117, 1995 Idaho Sess. Laws ch. 121 § 2 (codified at Idaho Code § 40-203(1)).</p> <p>QUOTE: "40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM OR PUBLIC RIGHTS OF WAY. "(1) A board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, shall use the following procedure to abandon and vacate any highway or public right-of-way in the county or highway district system including those which furnish public access to state and federal public lands and waters: "(a) The commissioners may by resolution declare its intention to abandon and vacate any highway or public right-of-way considered no longer to be in the public interest. "(b) Any resident, or property owner, within a county or highway district system including the state of Idaho, any of its subdivisions, or any agency of the federal government may petition the respective commissioners for abandonment and vacation of any highway or public right-of-way within their highway system. The petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings. "(c) The commissioners shall establish a hearing date or dates on the proposed abandonment and vacation. "(d) The commissioners shall prepare a public notice stating their intention to hold a public hearing to consider the proposed abandonment and vacation of a highway or public right-of-way which shall be made available to the public not later than thirty (30) days prior to any hearing and mailed to any person requesting a copy more than</p>	

Historical Statutes and Amendments				
Year = 1995	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>three (3) working days after any such request.</p> <p>"(e) At least thirty (30) days prior to any hearing scheduled by the commissioner to consider abandonment and vacation of any highway or public right-of-way, the commissioners shall mail notice by United States mail to owners and operators of an underground facility, as defined in section 55-2202, Idaho Code, that lies within the highway or public right-of-way.</p> <p>"(ef) At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway or public right-of-way, the commissioners shall mail notice to owners of land abutting the portion of the highway or public right-of-way proposed to be abandoned and vacated at their addresses as shown on the county assessor's tax rolls and shall publish notice of the hearing at least two (2) times if in a weekly newspaper or three (3) times if in a daily newspaper, the last notice to be published at least five (5) days and not more the twenty-one (21) days before the hearing.</p> <p>"(fg) At the hearing, the commissioners shall accept all information relating to the proceedings. Any person, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may appear and give testimony for or against abandonment.</p> <p>"(gh) After completion of the proceedings and consideration of all related information, the commissioners shall decide whether the abandonment and vacation of the highway or public right-of-way is in the public interest. The decision whether or not to abandon and vacate the highway or public right-of-way shall be written and shall be supported by findings of fact and conclusions of law.</p>	

Historical Statutes and Amendments				
Year = 2000	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: S.B. 1407, 2000 Idaho Sess. Laws ch. 251, § 2 (codified at Idaho Code § 40-203(1)).</p> <p>QUOTE: "40-202. DESIGNATION OF HIGHWAYS AND PUBLIC RIGHTS-OF-WAY. ... (3) Highways laid out, recorded and opened as described in subsection (2) of this section, by order of a board of commissioners, and all highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of the board of commissioners, are highways. If a highway created in accordance with the provisions of this subsection is not designated on the official map of the respective highway system or is not opened as described in subsection (2) of this section, there shall be no duty to maintain that highway, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs, until the highway is designated as part of the county or highway district system by inclusion on the official map as a highway and opened to public travel as a highway."</p> <p>NOTE: Eliminated references to highway map.</p>		<p>CITE: S.B. 1407, 2000 Idaho Sess. Laws ch. 251, § 2 (codified at Idaho Code § 40-203(1)).</p> <p>QUOTE: "40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM HIGHWAYS OR PUBLIC RIGHTS-OF-WAY. (1) A board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, shall use the following procedure to abandon and vacate any highway or public right-of-way in the county or highway district system including those which furnish public access to state and federal public lands and waters: "(a) The commissioners may by resolution declare its intention to abandon and vacate any highway or public right-of-way considered no longer to be in the public interest. "(b) Any resident, or property owner, within a county or highway district system including the state of Idaho, any of its subdivisions, or any agency of the federal government may petition the respective commissioners for abandonment and vacation of any highway or public right-of-way within their highway system. The petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings. "(c) The commissioners shall establish a hearing date or dates on the proposed abandonment and vacation. "(d) The commissioners shall prepare a public notice stating their intention to hold a public hearing to consider the proposed abandonment and vacation of a highway or public right-of-way which shall be made available to the public not later than thirty (30) days prior to any hearing and mailed to any person requesting a copy more than</p>	

Historical Statutes and Amendments				
Year = 2000	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>three (3) working days after any such request.</p> <p>"(e) At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway or public right-of-way, the commissioners shall mail notice by United States mail to <u>known</u> owners and operators of an underground facility, as defined in section 55-2202, Idaho Code, that lies within the highway or public right-of-way.</p> <p>"(f) At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway or public right-of-way, the commissioners shall mail notice to owners of <u>record of land</u> abutting the portion of the highway or public right-of-way proposed to be abandoned and vacated at their addresses as shown on the county assessor's tax rolls and shall publish notice of the hearing at least two (2) times if in a weekly newspaper or three (3) times if in a daily newspaper, the last notice to be published at least five (5) days and not more the twenty-one (21) days before the hearing.</p> <p>"(g) At the hearing, the commissioners shall accept all information relating to the proceedings. Any person, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may appear and give testimony for or against abandonment.</p> <p>"(h) After completion of the proceedings and consideration of all related information, the commissioners shall decide whether the abandonment and vacation of the highway or public right-of-way is in the public interest <u>of the highway jurisdiction affected by the abandonment or vacation</u>. The decision whether or not to abandon and vacate the highway or public right-of-</p>	

Historical Statutes and Amendments				
Year = 2000	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			way shall be written and shall be supported by findings of fact and conclusions of law.	

Other Provisions Bearing on Road Creation and Abandonment	
Citation	Comment
CITE: Gen. Laws of Territory of Idaho, at p. 162, § 20 (1885).	NOTE: Section 21 of this Act provided that every male between 21 and 50 must pay a road tax or perform road labor. Other sections of the Act deal with "viewers."
CITE: Idaho Code Ann. (Political Code) §§ 1185 to 1211 (1901) (repealed).	NOTE: Sections 1185 through 1211 are presented under the heading "Laying Out, Altering and Discontinuing Roads". It provides a mechanism for citizens within a road district to petition to alter, discontinue or construct a new road. (It does not deal with the dedication or recognition of existing roads.) The statute requires the appointment of "viewers" who must "view and survey any proposed alteration of an old or opening of a new road." Section 1188. However, this may be dispensed with upon written consent of all owners of the land to be used for that purpose. Section 1203. NOTE: This outline does not track the origin and subsequent history of these sections.
CITE: S.B. 1108, 1993 Idaho Sess. Laws ch. 412, § 1 (codified at Idaho Code § 40-117(6)).	NOTE: Added new definition of "public rights of way" expressly stating that officials have no obligation to construct or maintain.
CITE: S.B. 1367, 1998 Idaho Sess. Laws ch. 184, § 1 (codified at Idaho Code § 40-202).	NOTE: Added new section 40-202(6) requiring an inventory of public rights-of-way.
CITE: 1998 Idaho Sess. Laws, Sen. Con. Res. No. 136.	NOTE: Concurrent resolution adopted. It recognized the confusion surrounding identification and mapping requirements for highways including R.S. 2477 rights-of-way. It urged the Local Highway Technical Assistance Council to review the process.
CITE: S.B. 1408, 2000 Idaho Sess. Laws ch. 252, § 1 (codified at Idaho Code § 40-117).	NOTE: Amended definition of "Public right-of-way." Provided that highway agencies may choose, in their discretion, to provide public maintenance of such.
CITE: Idaho Code § 40-2319 (H.B. 265, 1985 Idaho Sess. Laws ch. 253, § 2).	NOTE: H.B. 265 also added a new section authorizing criminal penalties for unlawful restrictions of public access. The statute is quoted in full below. QUOTE: "40-2319. Encroachments - Removal - Notice - Penalty for failure to remove - Removal by county or highway district - Abatement "(1) If any highway or public right-of-way under the jurisdiction of a county or highway district is encroached upon by gates, fences, buildings, or otherwise, the appropriate county or highway district may require the encroachment to be removed. If the encroachment is of a nature as to effectually obstruct and prevent the use of the highway or public right-of-way for vehicles, the county or highway district shall immediately cause the encroachment to be removed. "(2) Notice shall be given to the occupant or owner of the land, or person causing or owning the encroachment, or left at his place of residence if he resides in the highway jurisdiction. If not, it shall be posted on the encroachment, specifying the place and extent of the encroachment, and requiring him to remove the encroachment within ten (10) days. "(3) If the encroachment is not removed, or commenced to be removed, prior to the expiration of ten (10) days from the service or posting the notice, the person who caused, owns or controls the encroachment shall forfeit up to one hundred fifty dollars (\$150) for each day the encroachment continues unremoved. "(4) If the encroachment is denied, and the owner, occupant, or person controlling the encroachment, refuses either to remove it or to permit its removal, the county or highway district shall commence in the proper court an action to abate the encroachment as a nuisance. If the county or highway district recovers judgment, it may, in addition to having the encroachment abated, recover up to one hundred fifty dollars (\$150) for every day the nuisance remained after notice, as well as costs of the legal action and removal. "(5) If the encroachment is not denied, but is not removed within five (5) days after the notice is complete, the county or highway district may remove it at the expense of the owner, occupant, or person controlling the encroachment, and the county or highway district may

Other Provisions Bearing on Road Creation and Abandonment	
Citation	Comment
	recover costs and expenses, as well as the sum of up to one hundred fifty dollars (\$150) for each day the encroachment remained after notice was complete."

